Nos. 79-1252 and 79-1502

SUPREME COURT OF THE UNITED STATES

October Term, 1980

STATE OF CALIFORNIA, et al.,
Petitioners,

v.

SIERRA CLUB, et al.,
Respondents.

KERN COUNTY WATER AGENCY, et al.,
Petitioners,

v.

SIERRA CLUB, et al.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS SIERRA CLUB, HANK SCHRAMM AND WILLIAM DIXON

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STATEMENT OF THE CASE

In order to avoid unnecessary repetition, plaintiffs and respondents Sierra Club, Hank Schramm and William Dixon will adopt, with two discrete reservations, the Statement of the Case set forth at pages 3-11 of the Brief for the Federal Respondents previously filed in these cases by the Solicitor General on December 19, 1980. The two exceptions relate to (1) the description, at page 6 of the government's brief, of the scope of the allegations of plaintiffs' complaint in the district court, and (2) the statement, in footnote 8 on pages 8-9 of that brief, that, as a result of the temporary interruption of the trial proceedings by these interlocutory appeals, "plaintiffs never established any particularized damages resulting from the legal violations found."

With regard to the first of these matters, the federal respondents' description of plaintiffs' complaint seems to suggest that plaintiffs' allegations of the damage arising from the defendants' pumping activities in the Delta have encompassed only "adverse effects upon wildlife, fisheries and recreation" caused by "degradation in water quality." This description is incomplete. An accurate account of the full scope of plaintiffs' claims would also include a reference to the further allegation that the defendants' water diversions "directly affect navigation in said waters and the operation in said waters of pleasure boats,

ships and other vessels" by plaintiffs and others utilizing the Delta channels for navigational pursuits (Jt. App. 22a).

The federal defendants' statement that "plaintiffs never established any particularized damage resulting from the violations found" is likewise somewhat misleading. It is true that the defendants' exercise of their right to pursue interlocutory appeals from the preliminary injunction entered at the conclusion of the first phase of the bifurcated trial has temporarily foreclosed plaintiffs from presenting all of the available evidence of the precise nature and magnitude of the damages suffered by them. However, even the truncated record developed thus far includes ample evidence to the effect that defendants' violations of the Rivers and Harbors Act have caused definite, quantifiable and severe injury to commercial fishing and recreational fishing and hunting, and to the capacity of the Delta channels to accommodate recreational and commercial navigation (Pet. App. 88-91; Jt. App. 95a; PX 7, 11, 14, 17); and the district court has expressly found that plaintiffs are among those engaged in these adversely affected activities (Pet. App. 67-68).

Although plaintiffs do not similarly adopt the separate statements of the case previously submitted in the two briefs filed by petitioners State of California and Kern County Water Agency et al., plaintiffs do not dispute the literal accuracy, as opposed to the relevancy, of the factual assertions appearing in either of

those statements. One potentially confusing ambiguity in the statement submitted by petitioner State of California, however, should be noted. At various points in its Statement of the Case, the State refers to the proposed Peripheral Canal project in such a way as to suggest that a determination of the legal status of this project is still an issue in these proceedings (Brief for California, page 10 and note 6; see also the State's reference to section 9 of the Rivers and Harbors Act, 33 U.S.C. §401, which the district court found to be applicable only to the Peripheral Canal, as one of the "statutes involved" in these cases). As the court of appeals noted in its opinion (Pet. App. 8) and as the federal respondents have previously informed this Court (Brief for Federal Respondents, page 9 n.11), no appeal was taken by the State from the portion of the district court's order requiring Corps of Engineers approval for this proposed expansion of the State's diversion facilities. Accordingly, this matter was not considered by the court of appeals, and no challenge to this aspect of the district court's order is now before this Court.*

* It might also be noted that, if the Peripheral Canal had not been excluded from further consideration in these proceedings, most of the State's recital in its brief regarding the impact of its activities on the navigable capacity of the affected waterways would be rendered grossly inaccurate. Although the State makes much of the fact that the substantial lowering of water levels caused by the present operation of the Delta and Tracy pumping plants has occurred primarily in the (contd.)

SUMMARY OF ARGUMENT

Section 12 of the Rivers and Harbors Act of 1899 includes a general and unqualified grant to the district courts of jurisdiction to enjoin violations of section 10 of the Act. The further grant of enforcement authority to the Attorney General in section 12 includes no statement or indication that this authority is intended to be exclusive. The language of the Act thus suggests, though it does not compel, the conclusion that private relief is authorized for any violation of section 10.

The legislative history of the Act and the background of its enactment manifest a very clear understanding on the part of Congress that the provisions of section 10 would indeed be privately enforceable. The pre-existing common law afforded a right to injunctive relief to any person "specially injured" by an unlawful obstruction to a navigable waterway, and this right had been frequently enforced in both state and federal

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(footnote contd.) immediately adjacent navigable channels of the Delta itself and was not found to exceed (at a "minimum") one or two inches in the major commercial shipping channels of the Sacramento and San Joaquin Rivers (Pet. App. 89-90), construction and operation of the proposed Peripheral Canal, according to the district court's unchallenged findings, would divert "as much as 80 per cent" of the Sacramento River's entire flow during certain seasons of the year, in addition to causing various other severe effects on navigation, such as the complete damming of one tributary stream (Pet. App. 92).

courts in a long series of cases which Congress expressly took into account in enacting this statute. The principal purpose of the 1899 Act and its 1890 predecessor was simply to overrule a decision of this Court to the effect that an obstruction to navigation was not unlawful within the meaning of the rule applied in these cases when it had been authorized by state law and when Congress had enacted no specific countervailing prohibition. It would have been extraordinary if, in the very course of enacting the necessary federal prohibition and strengthening its enforceability by authorizing criminal prosecutions and civil suits by the Attorney General, Congress had simultaneously abrogated the principal pre-existing remedy of a private injunctive action which lay at the foundation of the entire body of law on which the new legislation was based. The "silence" of the statute on this issue is thus properly explained as an understandable omission by Congress to undertake the superfluous gesture of expressly "creating" an already existing remedy and as a mere failure to belabor the obvious. The record of the legislative debates on the statute is completely consistent with this explanation, and no evidence exists to support any other version of the legislative intent.

From shortly after its enactment to the present day, the lower federal courts have frequently and consistently permitted the Act to be enforced by private parties. The opinions of this Court have likewise

frequently intimated that the Act is privately enforceable. Congress's failure to take any action to correct this consistent judicial interpretation is further evidence of its intention to authorize a private remedy.

All of the other factors that are currently deemed relevant in determining the existence of a private remedy for violation of a federal statute favor the implication of such a remedy in this case. The common law background of the 1899 Act demonstrates that its primary purpose was to afford "special benefit" to the class of persons, such as respondents, who have been "specially injured" by obstructions to the nation's navigable waterways within the meaning of the pre-existing common law rule. No interference with the simultaneous public administration of the Act can possibly arise from affording the private relief sought in this case, which consists merely of enforcement of the offending parties' duty to submit their activities to review by the responsible public agency and does not encompass any effort to override or second-guess that agency's ultimate determination of the legality of those activities. Indeed, the preservation of a private remedy will substantially advance the public interest in enforcement of the Act because (1) private parties injured by obstructions to navigation which the Corps of Engineers has failed to review or approve will otherwise be relegated to common law nuisance actions

in the state courts, with the undesirable result that regulation of the interstate system of navigable waterways will come to depend on the vagaries of the disparate laws of the several states, and (2) the fact that the federal Water and Power Resources Service is itself, as this case illustrates, one of the most likely potential violators of the Act might be expected to deter the Corps of Engineers and the Attorney General from enforcing the statutory prohibitions with their full intended vigor in many situations unless those actually injured by the Service's unlawful activities are accorded the legal right to protest the inaction of these enforcement authorities. Finally, protection of the nation's system of navigable waterways, far from being a subject "traditionally relegated to state law," has been, at least since 1899, an area of exclusive federal competence in which state concerns have universally been forced to yield to the necessity for uniform national policies enforceable by the federal courts.

The court of appeals' construction of the substantive terms of section 10 of the Act is not only correct, but is the only interpretation which would make the statute operate in a sensible manner to effectuate its purposes. Petitioners' contention that a court must first determine whether an "unreasonable obstruction" to navigation actually exists before the Corps of Engineers is authorized to undertake its determination of the identical issue would render futile the entire

administrative enforcement scheme mandated by the statute. Petitioners' alternative argument that obstructions to navigation authorized by a state are entitled to some unspecified form of exemption from the ordinary operation of the statute flies in the face of the entire history and purpose of the 1899 Act as well as several specific contrary holdings of this Court. The further assertion that the statute cannot be applied to a diversion of the flow of a navigable waterway unless the streambed of the waterway is physically disturbed has likewise been rejected by this Court and would similarly transform the statute into an exercise in futility. Finally, the contention of the water-agency-petitioners that the statutory requirement of Corps of Engineers review of the challenged facility, even if applicable, was satisfied in the course of the State's belated procurement of a permit for an ancillary addition to that facility is, if not disingenuous, at least devoid of any support in the record.

ARGUMENT

I. These Respondents Have a Right to Maintain an Action in a Federal Court to Enjoin Violations of the Rivers and Harbors Act of 1899.

A. The Language of the Act Suggests the Existence of a Private Remedy.

As both the federal defendants and the intervening water agencies have previously pointed out in their briefs, the starting point for determining whether a violation of a federal statute may be redressed in an

action brought by private parties is the language of the statute itself (Brief for Water Agencies, page 11; Brief for Federal Respondents, page 16). Touche, Ross & Co. v. Redington, 442 U.S. 560, 568 (1979); Cannon v. University of Chicago, 441 U.S. 677, 689 (1979). Accordingly, the initial focus of the Court's effort to resolve that issue in this case must be those provisions of section 12 of the 1899 Act (33 U.S.C. §406) which expressly prescribe the civil remedies for violations of the Act's substantive prohibitions. The language of those remedial provisions consists in its entirety of the following few words (33 U.S.C. §406):

> [T]he removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any district court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States.

Altough the statute thus expressly confers jurisdiction on the district courts to enjoin all violations of the Act and also permits the Attorney General to seek such relief on behalf of the United States, it neither affirms nor denies that private parties as well may seek to enforce the equitable remedies which it authorizes the courts to grant. The question thus becomes: What does the statutory language imply in this regard? When Congress said that the federal courts might enjoin violations of the Act "and" that the Attorney General might seek such injunctive relief, did it mean that the

courts could grant equitable redress to any injured party and in addition the Attorney General was authorized to seek such relief on behalf of the general public, or did it mean that the equitable jurisdiction thus conferred could be exercised only at the request of the Attorney General? To put the same question another way: What is to be implied from Congress's silence with respect to the rights of private parties injured by the prohibited conduct? Did Congress omit an express prescription of these rights because it assumed that their existence was apparent from the pre-existing law and that only the Attorney General's authority to sue needed to be expressly conferred, or did it omit this prescription because it contemplated that no private remedy should be allowed?

This Court's only previous recent effort to derive answers to these sorts of questions from very similar statutory language occurred in Allen v. Board of Elections, 393 U.S. 544 (1969).* There, as here, the statute

* All of the Court's other recent decisions on private rights of action have involved very different statutory terminology. Thus, in National R.R. Passenger Corp. v. Passengers Assn. (Amtrak), 414 U.S. 453 (1974), the statute provided that the district court "shall have jurisdiction, except as otherwise prohibited by law, upon petition of the Attorney General or, in a case involving a labor agreement, upon petition of any employee affected thereby," thus plainly excluding jurisdiction to afford relief to other parties. 414 U.S. at 457. Similarly, in Securities Investor Protection Corp. v. Barbour, 421 U.S. 412 (1975), the remedial provision stated only that "the Commission may apply to the district court. . . for an (contd.)

conferred on the district courts "jurisdiction of proceedings instituted pursuant to this section," and then went on, without addressing the question of private remedies, to provide separately that the Attorney-General "may institute . . . an action" to enforce the substantive requirements of the statute. 393 U.S. at 555 n.18, 556 n.21. In the course of upholding a private remdey for violation of

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(footnote contd.) order" enjoining a violation of the statute. 421 U.S. at 417-18. In Cort v. Ash, 422 U.S. 66 (1975), the statute prescribed solely criminal penalties and granted no civil jurisdiction or remedies whatsoever. 422 U.S. at 74. In Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), the statute authorized relief only by a writ of habeas corpus and contained no other jurisdictional or remedial grant. 436 U.S. at 60. In Cannon v. University of Chicago, supra, the statute provided no judicial remedy of any kind, civil or criminal, and instead mandated enforcement of its provisions solely by administrative termination of federal financial assistance to the offending institutions. 441 U.S. at 684 n.4. In Touche, Ross & Co. v. Redington, supra, the statute contained only reporting requirements and again prescribed no judicial remedy at all, civil or criminal, for the types of misstatements in the required reports that were relied upon by the plaintiffs as the basis for their claim. 442 U.S. at 569. Finally, in Transamerica Mortgage Advisers, Inc. (TAMA) v. Lewis, 444 U.S. 11 (1979), the statute provided only that agreements violative of its terms should be "void," and authorized no remedy for its transgression other than the general power conferred on the Securities Exchange Commission "in its discretion" to seek injunctions against any violations of the Act. 444 U.S. at 16-18. In Cannon, supra, and TAMA, supra, the Court nevertheless managed to find that a private remedy could be implied solely from the substantive prohibitions of the statute. 441 U.S. at 717; 444 U.S. at 18-19.

the statute, this Court expressly rejected the argument that the last quoted provision implied that the Attorney General's enforcement authority was exclusive, finding instead that "the specific references to the Attorney General were included to give the Attorney General power to enforce what otherwise might be viewed as 'private' rights." Id. at 555 n.18.

The analysis in the Allen opinion provides an initial guide for the Court's interpretation of the nearly identical* statutory language presented here.

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* It is true that the grant of jurisdiction and the grant of executive enforcement powers appeared in separate sections of the statute in Allen, whereas here the two provisions are separated only by a comma and the word "and." It is certainly not apparent that any significance should be accorded to this distinction. For what it is worth, however, it should be noted that these two clauses of section 12 were separated by a semicolon rather than a comma in the corresponding section of the 1890 statute that was the direct predecessor of the Rivers and Harbors Act. Section 10 of the 1890 Act (26 Stat. 954-55) provided as follows:

> The creating or continuing of any unlawful obstruction in this act mentioned may be prevented and such obstruction may be caused to be removed by the injunction of any circuit court exercising jurisdiction in any district in which such obstruction may be threatened or may exist; and proper proceedings in equity to this end may be instituted under the direction of the Attorney-General of the United States.

All parties to this proceeding are apparently in agreement that the 1890 version of the statute must be taken as a more revealing indication of Congress's underlying intentions than its 1899 successor, because, as will be seen below, only the former enactment received (contd.)

Admittedly, the Court in Allen did not rest its holding solely on its literal parsing of this language. Nor do respondents here contend that such statutory phraseology necessarily implies a private right of action. On the face of it, however, this sort of apparently unqualified grant of general equitable jurisdiction to the district courts, followed only by a provision for executive enforcement which itself contains no hint that it is intended as a limitation on the general jurisdictional grant, is certainly supportive of the possibility that such rights may indeed exist. As the Court held in Allen, this type of legislative language is at least sufficient to justify a finding that Congress intended to permit private enforcement of the law when it is reinforced by a legislative history that is also indicative of such an intention. As respondents will demonstrate in the next section, the legislative history of the Rivers and Harbors Act is replete with such indications.

Far less revealing of Congress's intentions in this regard than these remedial provisions of the Rivers and Harbors Act is the language of the substantive prohibition which petitioners have been found to have violated. Section 10 of the Act merely provides that "it shall not be lawful" to engage in specified activities without a permit from the Corps of Engineers,

(footnote contd.) any substantive attention by the Congress, the later Act having been presented and accepted without debate as a mere compilation of prior statutes that would effect no change in the content of the law. 32 Cong. Rec. 2296-97.

and does not purport to address in any way the question of remedies for its violation, which are, as seen above, specifically prescribed by a separate section of the Act. 33 U.S.C. §403. The briefs of the federal defendants and the intervening water agencies nevertheless attach great significance to the particular wording of this prohibition, arguing that it should be taken as a purportedly clear indication of Congress's intention to withhold a private right of action. They rely for this view upon a passage in this Court's opinion in Cannon v. University of Chicago, supra, in which the Court observed that a prohibition phrased in this manner - that is, as a bare proscription of certain conduct which grants no right to any particular class of individuals to be protected from the proscribed conduct - is less indicative of an intention to authorize private suits than a statute which does expressly confer such a right. Id., 441 U.S. at 690-92.

These parties' reliance on this aspect of the Cannon decision is entirely misplaced in the present context. Even if one does not subscribe to Justice Powell's dissenting view in Cannon that the Court's effort to divine Congress's intentions regarding remedies from differences in the phrasing of its substantive proscriptions "gives undue significance to essentially stylistic differences in legislative draftsmanship" (441 U.S. at 740 n.13), there are at least three compelling reasons why the Cannon analysis must be deemed inapposite to this case. First, the Court in Cannon

was construing a statute which provided no judicial remedy whatsoever for its violation, so that an intent to confer a remedy on a class of private individuals had to be derived, if at all, solely from the language of the substantive sections of the law. Where, as here, the statute goes on to set forth a specific remedial scheme, the language of the remedial provisions, not the substantive prohibitions, has uniformly been deemed to be the proper focus of the analysis. See Cort v. Ash, supra at 74-75; SIPC v. Barbour, supra at 417-19; National R.R. Pass. Corp. v. Passengers Assn., supra at 456-57. Secondly, the use of the "shall not be lawful" language in the Rivers and Harbors Act is specifically and completely explained by a factor other than a congressional intention to withhold private remedies for violations of the Act. As will be shown in greater detail below, the Act was intended as a legislative overruling of a decision of this Court (rendered, significantly, in a suit between private parties) in which the Court had held that "there is no common law of the United States which prohibits obstructions and nuisances in navigable rivers." Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1, 8 (1888). The phrase "shall not be lawful" was simply a quite natural and direct way of expressing the contrary of this holding by authoritatively propounding the "law of the United States," and accordingly cannot be taken as implying anything one way or the other on the separate question of remedies. See 21 Cong. Rec. 8605 (remarks

of Sens. Edmunds and Dolph). Finally, there is no need, in any event, to resort to any form of speculation about the implications of the Act's proscriptive language in order to determine Congress's intention to benefit a particular class of individuals in the present context, because its intention in that regard is made perfectly clear by ample other evidence in the legislative history of the Act, all of which will be fully described below. For all these reasons, and despite whatever usefulness it may have possessed in Cannon, therefore, emphasis upon the phraseology of the prohibitory provision of the statute does not advance the analysis in this case.*

In sum, the language of the Rivers and Harbors Act, while not totally unrevealing, is incapable by itself of resolving the enigma of Congress's intentions regarding private remedies. As in Allen, supra, the unqualified grant of general equitable jurisdiction to the district courts and the absence of any indication that the executive enforcement authority conferred by

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* Another element of the language of the Act somewhat halfheartedly invoked by the other parties in support of their effort to preclude a private remedy is the statement in section 17 of the Act that "The Department of Justice shall conduct the legal proceedings necessary to enforce the provisions of" the Act. 33 U.S.C. §413. Even a cursory reading of the remainder of that section, however, reveals that the term "legal proceedings" refers exclusively to the criminal prosecutions that are authorized by various sections of the Act.

the Act was intended to be exclusive are at least suggestive that simultaneous private enforcement was contemplated. Concededly, however, these indications do not by themselves compel such a finding. Resort must therefore be had to a detailed review of the background and history of the congressional deliberations that led to the law's enactment.

B. The Common Law Background and Legislative History of the Act Demonstrate Indisputably that Congress Did Not Intend to Abrogate the Pre-Existing Right of any Person Injured by an Unlawful Obstruction to a Navigable Stream to Obtain an Injunction Against Continuation of the Obstruction.

The Rivers and Harbors Act of 1899 emanates from an era very different from our own - an era in which, among other important differences, nearly all civil litigation was among private parties and the vast complex of government regulatory agencies which exists today was an unknown phenomenon. It would be easy, therefore, by reviewing nothing more than the bare record of the legislative debates on this statute, to misunderstand the content and meaning of those debates and, in particular, to misinterpret the fact that, as will be seen below, none of the legislators, in the course of the debates, actually addressed directly or expressly the issue of whether a "private right of action" should or should not be available to enforce the terms of the statute. If such a misunderstanding is to be forestalled, any account of the legislative history of the Act must necessarily be preceded by a

rather detailed consideration of the contemporary legal climate and of the common law principles that were perceived by the Congress as furnishing the legal context for its enactment of this legislation. See Cannon v. University of Chicago, supra at 696-98, 702-3.

1. The Common Law Background

a. The Injunctive Remedy for Obstructions to Navigation

In the common law of the last century, it was well settled that any obstruction of a navigable stream, if undertaken without specific legal authorization, was a public nuisance and, further, that it would be enjoined at the suit of any private party to whom it had caused particular injury. E.g., Gilman v. Philadelphia, 70 U.S. 713, 722-24 (1866); Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. 518, 563 (1851); Mayor, etc., of Georgetown v. Alexandria Canal Co., 37 U.S. 91, 97-99 (1838); Piscataqua Navig. Co. v. New York N.H. & H.R. Co., 89 Fed. 362, 363, 365 (D.Mass. 1898), revd. in part on other grounds 101 Fed. 92 (1st Cir. 1901); Woodruff v. North Bloomfield Gravel Mining Co., 18 Fed. 753, 769-71 (C.C. Cal. 1884); Works v. The Junction R.R., Fed. Case No. 18,046, 30 Fed. Cas. 626, 627 (C.C. Ohio 1853); Lansing v. Smith, 4 Wend. 9, 25 (N.Y. 1829); Hughes v. Heiser, 1 Bin. 463, 465 (Pa. 1808). See, generally, Pollock, Torts 488-90 (Amer. ed. 1894); Smith, Private Action for Obstruction to Public Right of Passage, 15 Col.L.Rev. 1 (1915). Although some jurisdictions adopted rather stringent

tests regarding the kind and degree of injury that would suffice to sustain such an action (e.g., Davis v. County Commissioners, 26 N.E. 848, 849-50 (Mass. 1891)), the basic right to private relief was never questioned, and the federal courts appear to have unanimously adopted the more liberal rule of standing pursuant to which any individual who had suffered any form of actual injury other than the abstract injury to the right of free travel enjoyed by the public at large would be entitled to injunctive relief. Pennsylvania v. Wheeling & Belmont Bridge Co., supra at 566; Piscataqua Navig. Co. v. New York, N.H. & H.R. Co., supra at 363, 365; Woodruff v. North Bloomfield Gravel Mining Co., supra at 769. See Carver v. San Pedro L.A. & S.L. R.R. Co., 151 Fed. 334, 335-36 (S.D.Cal. 1906); Smith, supra at 16. Under this rule, injunctions were granted, not only to persons who had actually been prevented from navigating an obstructed stream, but also, for example, to a merchant whose shipping costs had been increased by the obstruction (Works v. The Junction R.R., supra), to a proprietor of connecting canals who had suffered a reduction of its toll revenues by reason of the unlawful obstructions (Pennsylvania v. Wheeling & Belmont Bridge Co., supra) and to land-owners forced to pay increased taxes in order to maintain public levees for protection against the flooding caused by the obstructions (Woodruff v. North Bloomfield Gravel Mining Co., supra).

b. Application of the Remedy in the Decisions of This Court

This equitable remedy against obstructions to navigation naturally became an important weapon of the commercial navigation interests in what Charles Warren has called "the great contest between the railroads and the steamboats in their struggle for supremacy in the development of modern means of transportation." 2 Warren, The Supreme Court in United States History 235 (1922). Because of the earlier establishment of federal supremacy in the field of navigation (Gibbons v. Ogden, 22 U.S. 1 (1824)) and the system of state franchising of railroads that prevailed prior to the enactment of the Interstate Commerce Act in 1890, this contest, and this judicial weapon in the contest, also became entwined in the great constitutional dispute that was then being waged over the question of the self-executing character of the Commerce Clause and the breadth of the federal commerce power. See Warren, supra at 134-38, 152-55, 168-82, 234-41. In view of the nature and importance of these issues and interests, it is not surprising that a significant proportion of the numerous cases filed during this period invoking this particular form of equitable relief* were finally brought before

* The government's brief refers to certain "rare occasions" on which private parties had sought to enjoin obstructions to navigation prior to 1890. Although neither the government nor these respondents have conducted any statistical survey, one gains the distinct impression, from even a casual perusal of the appellate reports and scholarly surveys of (contd.]

this Court for ultimate resolution. E.g., Willamette Iron Bridge Co. v. Hatch, supra; Huse v. Glover, 119 U.S. 543 (1886); Hamilton v. Vicksburg, Shreveport & Pac. R.R. Co., 119 U.S. 280 (1886); Cardwell v. American River Bridge Co., 113 U.S. 205 (1885); Escanaba & Lake Michigan Transp. Co. v. City of Chicago, 107 U.S. 678 (1883); Pound v. Turck, 95 U.S. 459 (1878); Gilman v. Philadelphia, supra; Pennsylvania v. Wheeling & Belmont Bridge Co., supra; Mayor, etc. of Georgetown v. Alexandria Canal Co., supra.

Of these cases, the most important for our present purposes is the well-known "Wheeling Bridge Case," Pennsylvania v. Wheeling & Belmont Bridge Co., supra. Although possessing great historic significance in its own right, the case is especially important in our present context because it marked one of the relatively few instances in which the standing of an injured party to maintain an action of this kind, which was otherwise so well settled as to require no reassurance, was actually questioned and expressly addressed. In that case, the plaintiff State of Pennsylvania was suing, not as a sovereign, but as a proprietor of certain canals and other transportation works whose revenues had allegedly declined by reason of the curtailment of navigation caused by the offending bridge. Id., 54

(footnote contd.) the period, that private nuisance actions of this precise kind must have comprised, in both numbers and importance, a sizable portion of the total docket load of the nineteenth century courts of equity. See generally, Smith, supra.

U.S. at 556-57, 559-61. See 2 Warren, supra at 234. Pointing out that the state was not the operator of any of the ships or craft that had actually been prevented from passing the bridge, the defendants argued that any indirect effect of this obstruction on its other commercial activities was not a sufficient "special injury" to confer standing upon it to maintain this type of action. In the course of rejecting this contention and upholding the state's standing to sue, this Court provided the following reaffirmation of the existence, content and scope of this equitable remedy (54 U.S. at 604-5, 606-7):

> An indictment at common law could not be sustained in the federal courts by the United States, against the bridge as a nuisance, as no such procedure has been authorized by Congress. But a proceeding, on the ground of a private and an irreparable injury, may be sustained against it by an individual or a corporation. Such a proceeding is common to the federal courts, and also to the courts of the State. The injury makes the obstruction a private nuisance to the injured party; and the doctrine of nuisance applies to the case where the jurisdiction is made out, the same as in a public prosecution. If the obstruction be unlawful, and the injury irreparable, by a suit at common law, the injured party may claim the extraordinary protection of a court of chancery.
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> Such a proceeding is as common and as free from difficulty as an ordinary injunction bill, against a proceeding at law, or to stay waste or trespass. The powers of a court of chancery are as well adapted, and as effectual for relief in the case of a private nuisance, as in either of the cases named.
>
> . . .

> Congress might punish such an act criminally, but until they shall so provide, an indictment will not lie in the courts of the United States for an obstruction which is a public nuisance. But a public nuisance is also a private nuisance, where a special and an irremediable mischief is done to an individual.
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> In the case of the City of Georgetown v. The Alexandria Co., 12 Peters, 98, this court say: "The Court of Equity, also, pursuing the analogy of the law, that a party may maintain a private action for special damages, even in case of a public nuisance, will now take jurisdiction in case of a public nuisance, at the instance of a private person, where he is in imminent danger of suffering a special injury, for which, under the circumstances of the case, the law would not afford an adequate remedy."

This court thus provided a clear confirmation of the availability of private relief against obstructions to navigation, a principle which, as will be shown below, was never again to be called into serious question in any of its subsequent decisions. The passage just quoted is also noteworthy, for reasons which will also appear below, for its incidental dictum that no similar right to relief could be asserted by a public enforcement officer in the absence of express legislative authorization (see also the subsequent opinion of the Attorney General to the same effect, 15 OAG 526 (1876)).

Having thus resolved the issue of the plaintiff's right to assert its claim, the Wheeling Bridge opinion then addressed the further question of whether the obstruction created by the defendant's bridge could be found to be unlawful in the face of the fact that it

had been expressly sanctioned by a Virginia statute. The Court gave an affirmative answer to that question as well, holding that Congress, in the exercise of its superior authority over regulation of interstate navigation, had implicitly condemned any obstruction of the river by granting licenses to steamboat operators and by approving an interstate compact which provided that "navigation of the River Ohio . . . shall be free and common to the citizens of the United States." Id., 54 U.S. at 605. It was this latter aspect of the Court's decision that was destined to be repudiated in a series of subsequent decisions which eventually provided the direct impetus for the Rivers and Harbors Act.

The Wheeling Bridge decision marked both a temporary zenith for the expansionist view of the federal commerce power and the swan song of the commercial navigation interests who had sought to resist any accommodation of waterborne commerce with the burgeoning system of interstate railways. See 2 Warren, supra at 235-36. Over the next four decades, the Court's holding on the substantive issue of the legality of state-authorized obstructions to navigation was expunged by a long series of decisions in which the Court consistently yielded to the growing reality "that bridges . . . are means of commercial transportation, as well as navigable waterways, and that the commerce which passes over a bridge may be much greater than would ever be transported on the water it obstructs," and consistently subordinated any notion of an implied constitutional

preference for waterborne shipping to the states' "municipal power to weigh the considerations which belong to the subject, and to decide which shall be preferred, and how far either shall be made subservient to the other." Gilman v. Philadelphia, supra at 729. Accord, Willamette Iron Bridge Co. v. Hatch, supra at 10; Huse v. Glover, supra at 548-49; Hamilton v. Vicksburg, Shreveport & Pac. R.R. Co., supra at 281-82; Cardwell v. American River Bridge Co., supra at 208-10; Escanaba & Lake Michigan Transp. Co. v. City of Chicago, supra at 683; Pound v. Turck, supra at 462-63. In these cases, the Court ruled, contrary to the holding in Wheeling Bridge, that federal licensing regulations and generalized federal guarantees of "free" navigability were not sufficiently direct expressions of the congressional will to justify condemnation of locally authorized projects that might obstruct navigation. E.g., Willamette Iron Bridge Co. v. Hatch, supra at 12, 14-15; Huse v. Glover, supra at 547-48; Hamilton v. Vicksburg, Shreveport & Pac. R.R. Co., supra at 284-85; Cardwell v. Amer. Bridge Co., supra at 211-12; Escanaba & Lake Mich. Transp. Co. v. City of Chicago, supra at 689-90. That being so, and there being no more specific congressional enactment prohibiting such obstructions, the Court concluded in each of these cases that there was no federal substantive law whatsoever that would prevent the states from authorizing whatever obstructions they pleased to the nation's system of navigable waterways.

E.g., Willamette Iron Bridge Co. v. Hatch, supra at 8, 10; Hamilton v. Vicksburg, Shreveport & Pac. R.R. Co., supra at 281-82; Escanaba & Lake Mich. Transp. Co. v. City of Chicago, supra at 683, 690; Gilman v. Philadelphia, supra at 730-32. This was of course the particular aspect of these decisions that eventually provoked the congressional reaction manifested in the Rivers and Harbors Act.

For present purposes, however, the significant feature of this reversal of judicial positions is that it did not embody any repudiation of, or even cast any doubt upon, the Wheeling Bridge opinion's express adoption of the basic remedial rule that, if an obstruction could be shown to be unlawful, a private plaintiff would have a right to maintain an action to abate it. Each of these decisions, instead, turned solely on the separate question whether the challenged obstruction, though concededly actionable if unlawful, was in fact unlawful, and based its negative answer to that question on the purely substantive grounds recited above. Willamette Iron Bridge Co. v. Hatch, supra at 8, 10; Huse v. Glover, supra at 547-49; Hamilton v. Vicksburg, Shreveport & Pacific R.R. Co., supra at 281-82, 284-85; Cardwell v. American River Bridge Co., supra at 208-12; Escanaba & Lake Michigan Transp. Co. v. City of Chicago, supra at 687-88; Pound v. Turck, supra at 464; Gilman v. Philadelphia, supra at 730-732. Indeed, in its opinion in Gilman v. Philadelphia, supra, which was the decision that actually initiated this constitutional

reversal, the Court went out of its way to point out that, while it was about to reject the substantive holding of Wheeling Bridge, it had no occasion to question that decision's enunciation of the basic equitable principle on which the plaintiff based his standing to maintain the action. On that issue the Court said (70 U.S. at 722-24):

> At the threshold of the investigation we are met by the objection from the defendants, that the complainants, "not being specially interested in navigation, cannot intervene for its protection." It is said, "that they are not the owners of licensed coasting vessels, and are not pilots nor navigators."
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> As regards this objection, the case is not essentially different in principle from the Wheeling Bridge case, 13 How. 553.
>
> The further objection was also taken in that case, that if a nuisance existed, it was of a public nature, and was an offense against the sovereignty whose laws were violated, and that the sovereign only could intervene for the correction of the evil.
>
> It was answered by the court, that wherever a public nuisance is productive of a specific injury to an individual, he may make it the foundation of an action at law, and if the injury would be irreparable, that a court of equity will interpose by injunction.
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> . . .
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> The law upon the subject is learnedly and ably examined. The objections were overruled. Considerations of fact, of the same character with those adverted to, exist in the case before us, and the reasoning and conclusions there are alike applicable in both cases.
>
> . . .

> This brings us to the examination of the merits of the case.

From that point forward, no further question was raised in any of these cases, all of which were private actions, regarding the plaintiff's standing to maintain the suit. The only other bare mention of that issue occurs in a single sentence in the lower court's opinion in the last of these cases, Willamette Iron Bridge Co. v. Hatch, supra, in which the circuit court had stated:

> If then, this bridge, in its construction or effect, is in conflict with either of these acts of Congress, it is so far unlawful, and if injurious in its operation to the rights of the plaintiffs, is a nuisance, and may be prevented or abated.

Hatch v. Wallamet Iron Bridge Co., 6 Fed. 326, 331 (1881), revd. on other grounds 125 U.S. 1 (1888). This Court took no exception to this statement of the remedial rule by the lower court, and instead expressly noted that the sole question being decided by it was "whether the erection of a bridge over the Willamette River at Portland was a violation of said Act of Congress [admitting Oregon to statehood on condition 'that all the navigable waters of said state shall be common highways, and forever free . . .'], " a question of purely substantive law to which the Court ultimately gave a negative answer. Id., 125 U.S. at 8. Thus, by this stage, the basic right of an injured private party to maintain an action to enjoin an unlawful obstruction to navigation had clearly attained the status of an unquestioned assumption in the minds of counsel and of this Court.

This last decision, though otherwise an unremarkable member of the long series of decisions that accomplished the demise of the substantive holding of the Wheeling Bridge case, was to acquire further significance by reason of the incidental fact that the losing plaintiff had been represented in this Court by a United States Senator, one J.N. Dolph of Oregon. Id., 125 U.S. at 2; 21 Cong. Rec. at 8605. Realizing that, by his own later admission, "the Supreme Court had anticipated the decision" against his client by its earlier decisions "in other cases, notably The City of Chicago v. The Escanaba Company" (21 Cong. Rec. 8605), he introduced in the Senate, while the Willamette Bridge case was still pending before this Court, the legislation that eventually resulted in the reversal of his client's defeat by the enactment of the Rivers and Harbors Act. S. 27, 50th Cong., 1st Sess. (1887); S. Rep. No. 224, 50th Cong., 1st Sess. (1888). The history of Congress's consideration and eventual enactment of what shortly became known as the Dolph Bill (see 21 Cong. Rec. 8685) is the subject of the next section of this brief. First, however, it is appropriate to summarize the foregoing account of the common law background of this legislation, and to assess its precise significance in the light of this Court's current standards for evaluating congressional intentions regarding private enforcement of federal law.

c. Implications of This Historical Background

The importance of pre-existing law in determining legislative intent was exhaustively reviewed by this Court only last year in Cannon v. University of Chicago, supra. In that case, which involved a statute prohibiting sex discrimination, the case law preceding enactment of the statute had allowed a private right of action for violation of a similar earlier statute proscribing racial discrimination, but Congress, in enacting the new prohibition against sex discrimination, had failed to address the issue of remedies for its violation. The Court held that a private right of action was nevertheless to be implied from the latter enactment, reasoning that it is "realistic to presume that Congress was thoroughly familiar with these unusually important precedents" authorizing a private right of action under the earlier statute, and that "the absence of legislative action to change" those precedents should therefore be taken as proof that Congress "expected its enactment to be interpreted in conformity with them." 441 U.S. at 698-99, 702-3. This approach was subsequently reaffirmed in Transamerica Mortgage Advisers, Inc. v. Lewis, supra, where the Court held that, when Congress enacted legislation declaring certain investment contracts "void" but providing no remedy, it should be deemed to have taken account of the pre-existing system of equitable remedies, and accordingly must have "intended that the customary legal incidents

of voidness would follow, including the availability of a suit for rescission or for an injunnction against continued operation of the contracts, and for restitution." 444 U.S. at 19.

These recent decisions place the authority of this Court firmly behind the common sense propositions that the legislative process does not take place in a vacuum and that congressional draftsmen accordingly intend their enactments to be interpreted as interstitial additions to a pre-existing legal fabric unless they expressly state otherwise. More particularly, these decisions hold that new enactments of substantive law are intended to be applied in accordance with the pre-existing scheme of customary remedies unless the legislation or the legislative history expressly indicates the contrary.

These principles in turn determine the direction which the above description of the legal background of the Rivers and Harbors Act must give to the examination of the legislative history of the Act which follows in the next section. As seen above, the pre-1890 decisions of this Court had clearly established (1) that a private action would lie to enjoin an unlawful obstruction to navigation, but (2) that an obstruction authorized by state law would not be deemed unlawful in the absence of a specific congressional prohibition, and further (3) that specific congressional action would also be necessary to authorize any challenge to such an obstruction by the Attorney General on behalf of the United

States. The statute which Congress enacted against this background expressly addresses the latter two issues but says nothing about the first, and the question has accordingly been presented whether Congress's silence on that score implies an intent to leave the existing remedial scheme in place or to change the law in that regard by abrogating the established remedial rule. The principles enunciated in Cannon, supra, and TAMA, supra, establish that the former answer to this question must be given unless a contrary intent is made to appear affirmatively and clearly from the statute or the legislative history.

This rule must be applied with a special stringency in this case because the otherwise empirically sound presumptions on which it is based are markedly reinforced by the particular background of the legislation at issue here. One does not even need to "presume" that Congress knows the pre-existing case law when, as here, the sponsor of the legislation in question has personally participated in the litigation from which the law developed and when, as will be seen below, he discusses the relevant cases by name with his senatorial colleagues in the very course of the legislative debates. Moreover, it is not only sensible, but virtually compelled by logical necessity, to assume that legislative silence on the question of private remedies does not imply abrogation of a remedy clearly recognized by prior decisional law when, as here, the legislation has been introduced for the specific purpose

of correcting a judicial failure to grant relief to a private plaintiff whose action had been based entirely on that very remedy. In this case, in other words, the usual improbability, noted in Cannon and TAMA, that a change in the law is intended when none has been expressed, is replaced by the virtual impossibility that legislation enacted to reverse particular judicial decisions could somehow be accompanied by an unexpressed intention to revalidate those same decisions by simultaneously abrogating a settled principle of the law of remedies. Something even more convincing than the ordinary clear showing of legislative intent to change the prior law should be demanded of those who would seek to substantiate such an extraordinary hypothesis. As will now be seen, no convincing evidence of any kind tending to support this claim can be derived from the legislative history of the Rivers and Harbors Act, which in fact affirmatively supports the opposite hypothesis.

2. The Legislative History of the Act

a. The Congressional Debates

The legislative history of the Rivers and Harbors Act of 1899 has been described on several prior occasions by this Court, most exhaustively in Justice Harlan's dissenting opinion in United States v. Republic Steel Corp., 362 U.S. 482, 498-503 (1960). See also United States v. Pennsylvania Industrial Chem. Corp., 411 U.S. 655, 663-66 (1973); United States v. Standard Oil Co., 384 U.S. 224, 226-28 (1966). As is there noted,

the history of the Act begins with the introduction of the Dolph Bill (S.27, 50th Cong., 1st sess.) in 1887, continues through the eventual enactment of this bill, with extensive amendments, as the Rivers and Harbors Act of 1890 (26 Stat. 954-55), and culminates in the reenactment of that statute, with minor changes, as part of a general recodification of navigation laws in the form of the Rivers and Harbors Act of 1899 (33 U.S.C. §§401 et seq.). The 1899 Act was presented and accepted without significant debate by the Congress as a mere "compilation" of existing law that changed "not ten words" in the prior statutory scheme. 32 Cong. Rec. 2296-97. All parties to this proceeding are accordingly in agreement that any indications of congressional intent which might be revealed by the Act's legislative history must therefore be found in the congressional deliberations on the 1890 predecessor statute (see Brief for Water Agencies, pages 19-21; Brief for Federal Respondents, page 21 n.13).

The debates on the 1890 statute, which consisted of brief discussions on the floor of the Senate on two consecutive days (21 Cong. Rec. 8601-8, 8684-90), are themselves not extraordinarily revealing. In particular, they contain no express disclosure of a congressional purpose to preserve or deny a "private right of action" to enforce the terms of the Act. The meaning which ought to be attributed to this silence, to the extent it is not already obvious from the preceding discussion of the prior law, will be discussed at a

later point below. First, however, it is appropriate to try to glean from the record of the debates what few indirect indications are available concerning Congress's intentions in this regard.

The first such indication is the clear confirmation of the fact, already noted by this Court in other contexts (United States v. Pennsylvania Industrial Chem. Corp., supra at 663; United States v. Republic Steel Corp., supra at 485-86) and conceded by the federal respondents in their brief (at page 21), that the Act was directly intended as a legislative overruling of the decisions in Willamette Iron Bridge Co. v. Hatch, supra, and its predecessors. In a colloquy among Senators Dolph, Gray and Edmunds, the latter being the author of the amendment that contained the actual language of the remedial provision at issue here, Senator Edmunds expressly confirmed that "it was for that purpose that the amendment . . . was introduced." 21 Cong. Rec. 8605. The compelling significance of this fact, in light of the further fact that Willamette Bridge and all of its predecessors were private actions, will be as obvious to this Court as it was to the court of appeals (Pet. App. 74-75 n.8).

The debates also clearly reveal a thorough awareness, on the part of all the participants, of the content of the pre-existing case law, including the private nature of all these earlier actions and the general availability of a private remedy for unlawful obstructions to navigation. Several of the relevant private actions were cited by

name in the debates (21 Cong. Rec. 8604-5), and one of the senators at one point, in a passage that will be more fully quoted below, expressly summarized the existing remedial rule that, when an unlawful obstruction to navigation was sought to be removed, "the only way in which it can be done under law, under judicial proceedings, is to condemn the [obstruction] as a nuisance. And how is that done? It must be done at the instance of some citizen or a number of citizens combining, who must institute the proceeding at their own expense; . . ." 21 Cong. Rec. 8603. Given these remarks, the principle that congressional silence should be interpreted as an intention to preserve the pre-existing law can be applied even without the benefit of the corollary presumption of congressional familiarity with the prior law. The legislators who enacted the Rivers and Harbors Act were in fact personally familiar with every thread of the legal fabric into which that Act was to be woven.

Finally, the debates provide a clear refutation of the notion, on which both the federal respondents and the intervening water agencies have principally based their arguments on this whole issue, that the statutory provision permitting enforcement of the Act by the Attorney General was intended as an implicit abrogation of the remedial rights of private parties. In the following remarks, which were delivered in opposition to a proposed amendment that would have deleted the Act's criminal enforcement provisions, Senator Vest of

Missouri eloquently expounded the actual congressional perception of the reasons why public enforcement of the Act was needed (21 Cong. Rec. 8603):

> It is a very well known fact that hundreds of bridges are constructed yearly in the United States, without any permission from Congress, over navigable streams under the jurisdiction of the Government.
>
> . . .
>
> Now, suppose there is no authority given to the Secretary of War, if they are obstructions, to remove them, what is the result? The only way in which it can be done under law, under judicial proceedings, is to condemn the bridge as a nuisance. And how is that done? It must be done at the instance of some citizen or a number of citizens combining, who must institute the proceeding at their own expense; and we know very well that that amounts simply to nothing at all. It may occasionally, and that is a very sporadic case, find some individual public-spirited enough and with sufficient means to enter a court of justice as an antagonist to one of these wealthy corporations, but I have never known such a case in my experience, and I hardly think any other Senator has.
>
> . . .
>
> These corporations can go into the court and they can protract litigation until their bridges will stand there indefinitely. The only power that they respect in this country is the power of the General Government. The only way in which you can reach them is through the Federal power.

These remarks concedly show that purely private enforcement of the right to free navigation, as under the pre-existing law, was perceived by the Congress as unsatisfactory. But they also clearly show that it was so perceived, not because private actions were deemed

undesirable, but because, by themselves, they were deemed inadequate for practical reasons to prevent particular obstructions that were being created by certain especially affluent and recalcitrant offenders. It follows, and is also clearly implied in this passage, that public enforcement was intended, not as a displacement of private remedies, but as a supplement that would be effective in those instances where private resources were inadequate to the task. The Senator's stirring expression of admiration for the "public-spirited" private suitors who had thus far waged the battle for freedom of navigation clearly demonstrates, perhaps more effectively than a direct statement to that effect, that Congress's purpose in granting enforcement powers to the Attorney General was to assist these public benefactors, not to thwart them by abolishing their existing legal rights.

Thus, every indication that can be derived from the actual record of Congress's deliberations on the Act supports, in one way or another, the view that existing private remedies were intended to be preserved and utilized as a method of enforcing the Act's substantive prohibitions. Why, then, did none of the congressmen say this in so many words? Why does the legislative history, like the statute itself, appear "silent" when one searches it for an explicit statement that, a "private right of action" is afforded by the Act?

Respondents submit that the answer to this question which clearly emerges from this entire account of the background and history of this Act is that such a statement was plainly unnecessary, and that in fact the proposition was so obvious to the 1890 Congress that any express statement of it would have been viewed as superfluous if not fatuous. It should again be recalled that this was an age when nearly all civil litigation was privately initiated, and that it was administrative enforcement by public officers, not the "private right of action," which was then viewed as an atypical remedy requiring explicit authorization. See Pennsylvania v. Wheeling & Belmont Bridge Co., supra at 604, 606. The foregoing discussion has demonstrated that, to this general perception, there must be added the following specific corroborative facts: (1) that a private remedy for obstructions to navigation was an accepted feature of nineteenth century common law; (2) that the Supreme Court had early reaffirmed and never again questioned the existence of this private remedy - even while it was refusing relief to many suitors on substantive grounds and even while it was denying in dicta the existence of any public remedy that might be invoked by the government - throughout the entire lengthy series of decisions that precipitated the enactment of this legislation; and (3) that the congressmen who passed the Act were thoroughly familiar, through personal involvement and otherwise, with all of these decisions and with their unquestioning acceptance of the principle

of private relief. When all of these factors are taken into account, it is plain that Congress simply would not have seen any need for an explicit statement that private enforcement of this enactment was contemplated. Indeed, against this background, even the bare question whether a "private right of action" was intended to be "implied" from this legislation appears as a curious modern anachronism that would scarcely have been understood by the 1890 Congress.

b. Other Alleged Indications of Legislative Intent

At all events, even if one rejects this interpretation of Congress's silence regarding "private rights of action" and views it instead as simply a case of unrevealing legislative oversight, a private right to enforce the provisions of the Rivers and Harbors Act would still have to be sustained. As noted above, the principle that must guide this examination of the Act's legislative history is that, when prior law has allowed a private remedy for violation of a certain substantive right and Congress then enacts a new substantive prohibition without revealing its intentions regarding private enforcement, it must be presumed to have intended no change in the prior law of remedies and, consequently, to have authorized private enforcement of its new enactment. Cannon v. University of Chicago, supra at 698-703; Transamerica Mortgage Advisers, Inc. v. Lewis, supra at 18-19. If nothing else is clear from the foregoing recital of the background of the Rivers and Harbors Act, it is at least beyond question

that the pre-existing case law allowed private parties to sue to enjoin any obstruction to navigation that could be shown to be unlawful. Even if the legislative history of the Act is viewed as disclosing absolutely nothing of Congress's intentions on the issue, therefore, the legal effect of that lack, by reason of the presumption adopted in Cannon and TAMA, supra, is to require the Act to be interpreted as authorizing private enforcement of its provisions. Cannon, supra at 698-99; TAMA, supra at 18-19. This result could be avoided only by a showing that Congress affirmatively intended to abrogate the prior remedial rule and to foreclose the right to private relief. See id. 441 U.S. at 686 n.7, 699, 703; 444 U.S. at 19. The burden of producing positive evidence of Congress's intentions therefore rests upon those who seek to resist private enforcement.

The federal respondents and the intervening water agencies have sought to satisfy this burden only in a curiously indirect and ultimately unconvincing fashion. They have been unable to point to any evidence of a congressional intention to abolish the private remedy in the record of the actual debates on the 1890 Act, which they barely discuss in their briefs. They have attempted to fill this void solely by resort to inferences allegedly to be drawn from congressional actions taken on two separate legislative proposals at a different session of the Congress. Even if the very remoteness of this sort of evidence, both in time and in subject,

from the central focus of our inquiry did not render it incapable of providing the sort of positive indication of congressional intent required by Cannon and TAMA, supra, both of these items would have to be disregarded in any event because they simply do not show what these parties claim they show.

The first item relied upon by these parties is a Senate amendment to the criminal enforcement section of the original version of the Dolph Bill which was adopted shortly after that bill was first introduced in 1887. Section 5 of the bill (S.27, 50th Cong., 1st sess., section 5), which is quoted in full in the federal respondents' brief (at pages 17-18), originally provided that the criminal fine and penalties prescribed therein were to be enforced and collected by the United States "at the suit of any district attorney of the United States, or at the suit of any person, by information to any district attorney . . . " The amendment changed this language so as to provide for enforcement "by the district attorney . . . at the instance of any person complaining." 19 Cong. Rec. 2338. Ultimately, neither version of the language was enacted, as this section was deleted from the bill before its enactment by the 1890 Congress.

There are at least two clear reasons why this trivial change in the language of a proposal that was never enacted cannot qualify as even a remote indication of a congressional intent to abrogate private civil remedies. In the first place, it is not at all

clear that the amendment would even have effected any real change in the enforcement rights that would have been conferred on private parties by this section. Both before and after the amendment, the prescribed fines were to be collected by, and to inure only to the benefit of, the United States, while private parties had the right, in both versions of the section, to compel such collection by some form of complaint to the district attorney. The only apparent change made by the amendment was in the form of this complaint, which originally was to be a "suit [by] any person, by information to the district attorney" and then became an "action . . . by the district attorney . . . at the instance of any person complaining." If anything was intended by this change other than clarification, it is certainly not apparent from the language, and the lack of any debate or comment accompanying its adoption supports the view that this was indeed its sole purpose. See 19 Cong. Rec. 2338.

Secondly, and more importantly, even if this amendment is interpreted as prescribing a major change in the enforcement rights of private parties, and even if, further, it is taken as evidencing a serious congressional purpose to curtail those rights, the fact remains that the rights thus curtailed would relate solely to the criminal enforcement provisions of the bill, which is a matter wholly separate from the subject of our present concern. Respondents readily concede that, though it was accomplished by means other

than this amendment, the right of private parties to initiate criminal enforcement of the Act was ultimately deleted by the Congress and is not presently conferred by any of the Act's provisions. See 33 U.S.C. §§406, 411, 413. Indeed, respondents will go further and point out that, in the course of the 1890 debates, Congress seriously considered deleting the entire criminal enforcement mechanism, leaving only the civil remedies presently prescribed by section 12 (33 U.S.C. §406). 21 Cong. Rec. 8603, 8606. How any of these events can be deemed probative of a congressional intent to abrogate the private civil remedy, however, is impossible to discern. If anything, they would seem to reinforce the importance of preserving such a remedy, and hence to prove a precisely opposite intention. For this second reason as well, therefore, reliance upon this obscure 1887 amendment to the original bill cannot aid the argument of the federal respondents and the water agencies on this issue.

The second item of alleged evidence of Congressional intent invoked by these parties is Congress's enactment of a certain 1888 law, eventually recompiled in the Bridge Act of 1906 and now codified as 33 U.S.C. §500, which provides that persons causing erosion of private land by the construction of bridges "shall be liable . . . to the persons injured in a sum double the amount of said injury." The federal respondents point to this otherwise completely unrelated statute as evidence that "when Congress wished to create rights of action in

private parties, it knew how to do so" (Brief for Federal Respondents, page 19). Again, however, there are at least two independently sufficient reasons why this argument is unsound.

First, this statute enacts a penal sanction in the form of double damages, not an ordinary civil remedy of the sort involved here. It is only the latter type of remedy which respondents have argued need not be "created" by an express statutory prescription, particularly where it can be demonstrated that the statute was enacted with awareness of a pre-existing private remedial scheme for its enforcement. Respondents readily admit that penal liability for double damages could never be "implied" in this same manner from congressional silence, and that Congress would never intend enforcement of such an extraordinary remedy without its express mandate. The fact that Congress would feel compelled to "do so" when it wished to create such an unusual remedy, however, bespeaks nothing about the significance to be attributed to its silence with regard to a well-recognized pre-existing system of equitable and common-law remedies. Or rather, if anything, it supports the proposition that such silence cannot be read as an abrogation of such an existing system, because it shows that Congress will affirmatively "do so" wherever and whenever it wishes to make any unusual change in the existing legal system, whether that change amounts to creation of an extraordinary penal sanction or to abrogation of recognized private remedial rights.

Secondly, in any event, even if this statute did create a civil damage remedy of the ordinary kind, the attribution of controlling significance to that fact in the present context would be improper. This Court recently cautioned against the dangers of precisely this sort of speculative extrapolation of congressional intent. Like the federal respondents here, the respondents in Cannon v. University of Chicago, supra, sought to derive a negative implication regarding private enforcement from the express mention of private remedies in other sections of the legislation at issue there. The Court rejected this argument in the following passage (441 U.S. at 711):

> The fact that other provisions of a complex statutory scheme create express remedies has not been accepted as a sufficient reason for refusing to imply an otherwise appropriate remedy under a separate section. See, e.g., J. I. Case Co. v. Borak, supra; Wyandotte Transportation Co. v. United States, supra. Rather the Court has generally avoided this type of "excursion into extrapolation of legislative intent," Cort v. Ash, supra, 422 U.S., at 82 n. 14, unless there is other more convincing evidence that Congress meant to exclude the remedy. See National Railroad Passenger Corp. v. National Assn. of Railroad Passengers, supra, 414 U.S. at 458-61.

In the end, then, far from sustaining their burden of an affirmative showing that Congress intended to displace the recognized system of private relief for obstructions to navigation, the federal respondents and water agencies have been able to point only to occurrences in the legislative history which are meaning-

less at best and in the end seem to provide less support for these parties' position than for that of respondents. The legislative history thus remains a silence - a silence that is eloquent with clear indications that Congress chose to say nothing about private rights only because to do otherwise would have been to belabor the obvious.

C. From Shortly After Its Enactment Down to the Present Day, the Act Has Been Frequently and Consistently Interpreted by the Federal Courts as Allowing Private Enforcement of Section 10, and Congress's Failure to Take Action to Change This Interpretation Is a Further Indication of Its Intention to Permit Such Enforcement.

In deciding whether the jurisidictional grant of section 12 of the Rivers and Harbors Act should be interpreted as authorizing private relief against violation of the substantive prohibitions of section 10, this Court is not writing on a clean slate. Commencing only two years after enactment of the statute, the federal courts have addressed this question on numerous occasions. With extremely few exceptions, all of these cases have held that violations of the statute can be redressed in a private action. These decisions, particularly those rendered nearly contemporaneously with the enactment of the statute, must naturally be accorded a certain amount of authoritative significance by this Court. Beyond this, however, the existence of this consistent line of authority, together with Congress's failure to take action to change the rule

there enunciated must be taken as a further sign that Congress itself contemplated private enforcement of the Act. Cannon v. University of Chicago, supra at 702-3.

The first reported decision to address the issue of private enforcement was E.A. Chatfield Co. v. City of New Haven, 110 Fed. 788 (D.Conn. 1901), in which a merchant shipper sought to enjoin, under the 1899 Act, the construction of a bridge by the City of New Haven without the permission of the Secretary of War required by section 10 of the Act. In overruling a demurrer which, among other defenses, raised a challenge to the right of a private party to enforce that section, the court held (110 Fed. at 793-94; citations omitted):

> Jurisdiction has always existed in the circuit court to have cognizance of suits of a civil nature between individuals which arise out of the laws of the United States when the matter in dispute exceeds a specified sum, and, if a cause of action has thus arisen, no further or more specific authority is requisite.
>
> It has not been questioned that if congress had authorized the construction of a bridge over navigable waters, in accordance with plans approved by the secretary of war, or by a named board of engineers, and the bridge should be constructed in such defiance of the approved plans as to obstruct navigation, that a bill in equity in behalf of an individual specially injured by such obstruction against the corporations which are constructing the bridge could be sustained in the circuit court upon the ground that the structure is in violation of the laws of the United States. The bill in this case is based upon the ground that after the construction of the bridge without the authority of the

United States it was found, in pursuance of an act of congress, to be an unreasonable impediment to navigation, and that the hindrance had not been removed.

It is next said that the bill does not show that the complainants had suffered a damage special and peculiar to themselves, and that the inconvenience was of a character which was common to the public generally, and that, therefore, the bill did not show a case sufficient for their individual relief. It is true that "relief will not be granted unless it appears that the party complaining will sustain a special or peculiar damage, - an injury distinct from that done to the public at large." And it is also true that the courts of Connecticut have required that the special injury should clearly appear, but the special injury to the Chatfield company, at least, is sufficiently averred in the bill.

The next in the succession of early decisions on this issue was that of the circuit court in Lownsdale v. Gray's Harbor Boom Co., 117 Fed. 983 (W.D. Wash. 1902). In that case, the court refused relief against an allegedly obstructive logging boom on the narrow ground that a court of equity could not enforce the asserted rights of a riparian landowner where the question of title to his land was in dispute and accordingly required prior settlement in a court of law. Nevertheless, the court affirmed in dicta the general availability of private relief against such an obstruction in the following passage [117 Fed. at 987]:

> Passing now to consideration of the proposed injunction against the alleged obstruction to navigation: If the boom is an obstruction not authorized by law, it is a public nuisance, which may be abated by proper proceedings instituted

in behalf of the state or the United States government. It is essential to the maintenance of the suit by any individual to abate a public nuisance for the complainant to show that he is peculiarly affected and especially injured by it. In this case the complainants do not claim to be peculiarly affected or specially injured by the obstruction of navigation, except as owners of the land described in their complaint. They aver that the boom and the logs which it holds constitute a barrier to free ingress and egress to and from the land. Their right, therefore, to complain of the obstruction of navigation and travel upon the river and slough, depends upon their ownership of the land, which is disputed, and until their title to the land shall have been established they cannot prove any special injury.

The final decision on this issue rendered during the Act's first decade was Carver v. San Pedro L.A. & S.L.R. Co., 151 Fed.334 (S.D. Cal. 1906). In that case, the court granted an injunction against an obstructing bridge constructed without an appropriate permit, relying upon the Act as the basis for its substantive ruling but turning to the pre-existing law of private remedies for nuisance as the sole ground for its remedial decision, precisely as Congress undoubtedly intended the courts to do. Thus, the court disposed of the remedial issue in the following passage, which is as significant for its citations as for its content (151 Fed. at 335):

> It is firmly established by a long line of federal decisions that an obstruction to navigable water may be enjoined by a private person who is injured thereby differently from the general public, either in degree or kind. Georgetown v. Alexander Co., 12 Pet. 98, 9 L.Ed. 1012;

Pennsylvania v. Wheeling, etc., Bridge Co., 13 How. 564, 14 L. Ed. 249; Union Pacific Railroad Co. v. Hall, 91 U.S. 343, 355, 23 L. Ed. 428; Baird v. Shore Line Ry. Co., 2 Fed. Cas. 427 (No. 758); Works v. Junction R.R., 30 Fed. Cas. 626 (No. 18,046); Hatch v. Wallamet Iron Bridge Co. (C.C.) 6 Fed. 326; Id. (C.C.) 6 Fed. 780. This last case was reversed by the Supreme Court, but the reversal was on jurisdictional grounds, not affecting the point now under consideration. Willamette Iron Bridge Co. v. Hatch, 125 U.S. 2, 8 Sup. Ct. 811, 31 L. Ed. 629.

The judges who rendered these three earliest decisions shared the general perceptions, linguistic usages and legal backgrounds of the legislators who enacted the statute. Since this perspective is difficult for us to recreate, these holdings should be given a special deference even by this Court. See Cannon v. University of Chicago, supra at 706 n.40.

At any rate, there followed, during the next seventy-five years, an almost unbroken string of dozens of decisions in which the lower federal courts either squarely held that a private remedy was available for violation of the Act or clearly indicated in dicta that the remedy would have been granted but for one or another circumstance, other than absence of a "private right of action," that happened to disqualify the plaintiff from obtaining relief on the merits in the particular case. Cited in chronological order, these decisions are: Silvey v. Commissioners of Montgomery County 273 Fed.202, 204 (S.D. Ohio 1921); Neches Canal Co. v. Miller & Vidor Lumber Co., 24 F.2d 763, 765 (5th

Cir. 1928); City of Memphis v. Ingram, 98 F.Supp. 395, 397-99 (E.D. Ark. 1951), revd. on other grounds 195 F.2d 338 (8th Cir. 1952); Tatum v. Blackstock, 319 F.2d 397, 399-400 (5th Cir. 1963); Puente de Reynosa, S.A. v. City of McAllen, 357 F.2d 43, 47 (5th Cir. 1966); Norfolk Dredging Co. v. Radcliff Materials, Inc., 264 F.Supp. 399, 403 (E.D. Va. 1967); Lauritzen v. Chesapeake Bay Bridge & Tunnel Dist., 259 F.Supp. 633, 638 (E.D. Va. 1966), affd. 404 F.2d 1001 (4th Cir. 1968); Citizens Committee for the Hudson Valley v. Volpe, 302 F.Supp. 1083, 1087 (S.D.N.Y. 1969), affd. 425 F.2d 97 (2d Cir. 1970); Alameda Conservation Assn. v. State of California, 437 F.2d 1087 (9th Cir. 1971); Lavagnino v. Porto-Mix Concrete, Inc. 330 F.Supp. 323, 325 (D. Colo. 1971); Monroe County Conservation Council v. Volpe, 472 F.2d 693, 702-3 (2d Cir. 1972); Hawkinson v. Blandin Paper Co., 54 F.R.D. 517, 518-19 (D. Minn. 1972); Sierra Club v. Leslie Salt Co., 354 F.Supp. 1099, 1103-4 (N.D. Cal. 1972); James River & Kanawha Canal Parks, Inc. v. Richmond Metropolitan Auth., 359 F.Supp. 611, 638-39 (E.D. Va. 1973), affd. 481 F.2d 1280 (4th Cir. 1973); Burgess v. M/V Tamano, 370 F.Supp. 247, 250 (D. Me. 1973); State of Florida v. Charley Toppino & Son, Inc., 514 F.2d 700, 702 n.4 (5th Cir. 1975); Potomac River Assn. v. Lundeberg Md. Sea School, Inc., 402 F.Supp. 344, 356-58 (D. Md. 1975); People of State of Ill. ex. rel. Scott v. Hoffman, 425 F.Supp. 71, 75-76 (N.D. Ill. 1977); Libby Rod & Gun Club v. Poteat, 594 F.2d 742, 748 (9th Cir. 1979); Sierra Club v. Andrus,

610 F.2d 581, 592 (9th Cir. 1979), cert. granted, ___ U.S. ___, 101 S.Ct. 68 (1980); Norfolk & Western Co. v. Dunbar & Sullivan Dredging Co., __ F.2d ___ (6th Cir., decided October 21, 1980). See also National Sea Clammers Assn. v. City of New York, 616 F.2d 1222, 1232 n.30 (3d Cir. 1980), cert. granted ___ U.S. ___, 49 USLW 3289 (1980); Riggle v. State of California, 577 F.2d 579, 582-83 (9th Cir. 1978); Radford Iron Co. v. Appalachian Elec. Power Co., 62 F.2d 940, 942-43 (4th Cir. 1933); Bellaire, Benwood & Wheeling Ferry Co. v. Interstate Bridge Co., 40 F.2d 323, 325-27 (4th Cir. 1930); Parsell v. Shell Oil Co., 421 F.Supp. 1275, 1277 (D. Conn. 1976), affd. per curiam 573 F.2d 1289 (2d Cir. 1977); Natural Resources Defense Council v. Grant, 355 F.Supp. 280, 290 (E.D.N.C. 1973). The only isolated departures from this otherwise unanimous view during this entire period have consisted of: (1) two very recent decisions, from the same district court, to the effect that the Attorney General's authority to enforce section 10 is exclusive (Citizens Comm. for Environmental Protection v. United States Coast Guard, 456 F.Supp. 101, 112 (D.N.J. 1978); Loveladies Property Owners Assn. v. Raab, 430 F.Supp. 276, 281 (D.N.J. 1975), affd. per curiam 547 F.2d 1162 (3d Cir. 1976)); (2) a handful of instances of overly broad dicta to the same general effect in cases that actually involved very different issues, such as the availability of private relief under other sections of the Act permitting exclusively criminal enforcement or an alleged

waiver of a state's sovereign immunity from damage suits (City of Evansville v. Kentucky Liquid Recycling Inc., 604 F.2d 1008, 1011-12 (7th Cir. 1979); Red Star Towing & Transp. Co. v. Department of Transp. of New Jersey, 423 F.2d 104, 105-6 (3d Cir. 1970); Barcelo v. Brown, 478 F.Supp. 646, 670-71 (D.P.R. 1979); Hooper v. United States 331 F.Supp. 1056, 1058 (D.Conn. 1971); State of South Carolina v. South Carolina Elec. & Gas Co., 41 F.Supp. 111, 118-19 (E.D.S.C. 1941)*); and

* The other parties to this proceeding have from time to time cited these decisions, as well as other decisions on these distinct issues which do not even include the type of broad dicta referred to, as a basis for representing to this Court that there is a serious "conflict" among the lower federal courts on the issue presented here. It is therefore worthwhile to point out why the issue involved here is indeed very different from the issues presented in these cases. The difference between the category of cases involving a qui tam complaint by a member of the general public seeking to enforce the criminal penalties of the Rivers and Harbors Act and the type of civil action by an injured party being prosecuted here is obvious on its face, as the court below was careful to take note. Pet. App. 21. See also Connecticut Action Now, Inc. v. Roberts Plating Co., 457 F.2d 81, 83-85 (2d Cir. 1972); Sierra Club v. Leslie Salt Co., supra at 1104 n.2. Also clearly distinguishable, as the court below and several other lower courts have further observed, are those cases which have reached divergent results on the private enforceability of the so-called "Refuse Act" (33 U.S.C. §407), a separate section of the Rivers and Harbors Act which provides no civil remedy whatsoever and relies solely on the Act's criminal penalties for its enforcement. Pet. App. 21. See National Sea Clammers Assn. v. City of New York, supra at 1232 n.30; Parsell v. Shell Oil Co., supra at 1277. Compare Natural Resources Defense Council v. Grant, supra. (contd.)

(3) two cases in which the courts expressed doubt regarding the availability of private relief, but declined to resolve the issue on the ground that, in any event, the party before them had not alleged the type of particular injury that would sustain such a claim (Connecticut Action Now, Inc. v. Roberts Plating Co., supra at 89; Carolina Power & Light Co. v. South Carolina Public Service Auth., 94 F.2d 520, 524 (4th Cir. 1938)).*

(footnote contd.) Finally, this Court itself has acknowledged that cases presenting the question whether a state has intentionally waived its sovereign immunity from private damage actions by entering upon a federally regulated activity, which requires a determination whether Congress has authorized private actions against the state "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction," present an issue very different from the mere implication of a private right of action in suits for injunctive relief of the kind presented here. Edelman v. Jordan, 415 U.S. 662, 673-74 (1974), quoting Murray v. Wilson Distilling Co., 213 U.S. 151 (1909). Accord, Riggle v. State of California, supra at 583; Intracoastal Transp., Inc. v. Decatur County, 482 F.2d 361, 365-66 (5th Cir. 1973). Compare Lauritzen v. Chesapeake Bay Bridge & Tunnel Dist., supra.

* Concurrently with the development of the nearly unanimous view that the Act confers a private remedy enforceable on the "law side" of the federal court under 28 U.S.C. §1331, an even more numerous group of admiralty decisions were construing the Act as establishing a basis for negligence claims under 28 U.S.C. §1333 on behalf of private parties injured in collisions with obstructive bridges and by other violations of the Act. E.g., Complaint of Tug Helen B. Moran, 560 F.2d 527, 528 (2d Cir. 1977); (contd.)

During the same period, several decisions of this Court similarly indicated, albeit without addressing the issue with complete explicitness, that a private cause of action would lie for violation of section 10. Only four years after enactment of the statute, for example, the Court upheld the right of a private party to maintain what might be called a 'reverse-section-10-action,' sustaining an injunction against local governmental interference with a private project authorized by a Corps of Engineers permit. Cummings v. Chicago, 188

(footnote contd.) Complaint of Wasson, 495 F.2d 571, 579-80 (7th Cir. 1974); Acme Boat Rentals, Inc. v. J. Ray McDermott & Co., 424 F.2d 393, 395 (5th Cir. 1970); Morania Barge No. 140 v. M. & J. Tracy, Inc., 312 F.2d 78, 80 (2d Cir. 1962); The Fort Fetterman v. South Carolina Highway Dept., 261 F.2d 563, 565, 567 (4th Cir. 1958); F.S. Royster Guano Co. v. Outten, 266 Fed. 484, 486 (4th Cir. 1920); Board of Cmrs. of Port of New Orleans v. M/V Agelos Michael, 390 F.Supp. 1012, 1015 (E.D. La. 1974); Dow Chem. Co. v. Dixie Carriers, Inc., 330 F.Supp. 1304, 1307 (S.D. Tex. 1971), affd. 463 F.2d 120 (5th Cir. 1972); American Zinc Co. v. Foster, 313 F.Supp. 671, 680-81 (S.D. Miss. 1970); Reading Co. v. Pope & Talbot, Inc,, 192 F.Supp. 663, 667 (E.D.Pa. 1961), affd. per curiam 295 F.2d 40 (3d Cir. 1961); Gulf Atl. Transp. Co. v. Becker Sand & Gravel Co., 122 F.Supp. 13, 17 (E.D.N.C. 1954); United States v. Norfolk-Berkeley Bridge Corp. 29 F.2d 115, 124-25 (E.D. Pa. 1928). While many of these cases can perhaps be distinguished on the ground that they merely viewed the Act as providing a standard of conduct for adjudicating claims that ultimately rested on some other jurisdictional base, others among them cannot be read so narrowly. In Gulf Atl. Transp. Co. v. Becker Sand & Gravel Co., supra, for example, the court said (122 F.Supp. at 17-18; citations omitted): (contd.)

U.S. 410 (1903). In another case arising in the same decade, the Court dismissed a writ of error in a private action directly based on section 10 on the basis of an adequate state ground for the judgment below, extensively discussing the issues in the case without ever intimating that the underlying cause of action might not be sustainable because of the unavailability of a "private right of action" to enforce the Act. North Shore Boom & Driving Co. v. Nicomen Boom Co., 212 U.S. 406 (1909). Most

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(footnote contd.)

> Congress has specifically prohibited the creation of any obstruction, not affirmatively authorized, to the navigable capacity of any United States waters, 33 U.S.C.A. §403; . . . Any person who sustains a special injury by an unlawful obstruction of or deposit in navigable waters may maintain an action for the resulting damages.
>
> . . .
>
> It is not necessary for libelant to prove that respondent was negligent in the way it operated its gravel washing plant. Whether the theory of the action be negligence or nuisance a showing that respondent unlawfully obstructed a navigable stream entitles libelant to recover any damages proximately caused it by such obstruction . . .

Even those decisions that are more clearly confined to the standard-of-conduct rationale can be read as some authority for a private right of action on the law side of the court insofar as the role played by the Act in these admiralty cases is not really very different from the role Congress apparently contemplated it would play in legal and equitable cases. As shown above, the principal thrust of the Act as a whole was simply to furnish substantive prohibitions which Congress assumed would automatically become privately enforceable by virtue of the entire panoply of pre-existing legal, equitable and admiralty remedies.

significantly, in Wisconsin v. Illinois, 278 U.S. 367 (1929), a decision relied upon by the court below as a sub silentio approval of private enforceability, the Court sustained a claim by a party other than the Attorney General - namely, a state - for which the only legal basis recited in the opinion was "that the withdrawals [of water from Lake Michigan] were in palpable violation of the Act of Congress of March 3, 1899 [the Rivers and Harbors Act]." 278 U.S. at 400.* Fourthly, in Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967), the Court, besides generally advocating a "broad" construction of the remedial provisions of the Act, expressly held that the remedies specified therein "were not intended to be exclusive," and on that basis authorized a proprietary action by the United States to recover its expenses sustained in removing a sunken ship that was obstructing a navigable waterway. 389 U.S. at 200-1. Finally, in Cort v. Ash, supra at 79, the Court cited Wyandotte, supra, among other cases, as representing an instance of "implication of a private cause of action."

* The other parties have striven mightily to distinguish this decision, claiming that the plaintiff's reliance on the Rivers and Harbors Act was only an alternative basis for its complaint and that the judgment in its favor actually rested on other grounds (e.g., Brief for Water Agencies, pages 25-26). They have been unable to point to any other such basis or ground, however, beyond a single phrase in the opinion referring to damage inflicted upon "riparian and other rights of the complainant" (278 U.S. at 410), which hardly constitutes a statement of a specific alternative legal basis for either the complaint or the judgment.

It is true that the Court very recently seemed to retreat from this last arguable overstatement by reclassifying the Wyandotte decision among those decisions that have "implied causes of action in favor of the United States where the statute creates a duty in favor of the public at large." Cannon v. University of Chicago, supra at 691 n.13. It is also true, of course, that the Court's grant of certiorari on this issue in this case indicates that it does not view the issue of private enforceability as having been definitively resolved. Nevertheless, a perceptive review of this entire series of encounters with this issue in the opinions of this Court would necessarily convey the distinct impression that the Court has harbored some inclination, at the very least, to concur in the nearly unanimous view of the lower courts that a private remedy is available for violations of the Rivers and Harbors Act.

All of these decisions, particularly the decisions of this Court and the earliest decisions of the lower federal courts, are of course entitled to be treated as authoritative precedents in the context of the Court's present effort to reach a resolution of this issue in this case. See Cannon v. University of Chicago, supra at 706 n.40. Perhaps more importantly, however, they have also constituted a clear signal to the Congress that the prevailing judicial interpretation of the Act has permitted its enforcement by private parties. The fact that Congress took no action to correct that

interpretation during the entire 80-year history of this line of authority is further persuasive evidence that Congress has shared the courts' view that the Act should be enforced in this manner. The importance of this consideration was recently stressed by this Court in Cannon v. University of Chicago, supra, in a passage of that opinion which, with appropriate substitutions of dates and titles, would seem directly applicable to this case (441 U.S. at 702-3):

> Finally, the very persistence - before 1972 and since, among judges and executive officials, as well as among litigants and their counsel, and even implicit in decisions of this Court - of the assumption that both Title VI and Title IX created a private right of action for the victims of illegal discrimination and the absence of legislative action to change that assumption provide further evidence that Congress at least acquiesces in, and apparently affirms that assumption.

The decisions reviewed herein thus provide a final decisive reinforcement, not only by way of stare decisis but as a further indication of congressional intent, for the conclusion that a private remedy exists for violation of section 10 of the Rivers and Harbors Act.

D. The Other Factors Deemed Relevant to Implication of a Private Remedy Favor Its Implication in This Case.

This Court has recently indicated that, in cases of this kind, "our task is limited solely to determining whether Congress intended to create [a] private right of action," and that the inquiry "ends there" once the legislative intent in this regard has been ascertained.

Touche, Ross & Co. v. Redington, supra at 568, 576. Accord, Transamerica Mortgage Advisers Assn. v. Lewis, supra at 15-16, 23-24. Since it has already been demonstrated that Congress contemplated private enforcement when it enacted the Rivers and Harbors Act, respondents might safely conclude their discussion of this issue at this point. Nevertheless, since the Court has also intimated in these recent decisions that the additional "factors" originally identified as "relevant" to the resolution of this issue in Cort v. Ash, supra, might still be given some weight, at least as further aids to determining legislative intent, and because the Solicitor General has taken the position in his brief that "ill effects on the administration of section 10" by the Corps of Engineers would result from acknowledgment of Congress's intention to afford a private remedy, respondents are compelled to undertake a brief discussion of the application of these additional considerations to the circumstances of this case (Brief for Federal Respondents, page 23 n.15). Touche, Ross, supra at 575-76; TAMA, supra at 23-24. See also, Cannon, supra at 688 ("a court must carefully analyze the four factors that Cort identifies").

1. Benefit to a Particular Class

Besides ascertainment of Congress's intent from the legislative history, the first additional "factor" mentioned in Cort v. Ash, supra, is whether the statute confers a benefit on a particular class of individuals as opposed to the public at large. Cort v. Ash, supra

at 78-79. As regards this case, this question has already been affirmatively answered by the earlier recital of the common-law background of the Rivers and Harbors Act. It was there shown that only those persons who could demonstrate a "particular injury" to themselves by reason of an obstruction to navigation - and not the public at large - could invoke the particular equitable remedies which Congress took into account when it enacted the Rivers and Harbors Act. Gilman v. Philadelphia, supra at 604-5. It was also shown that the Act was passed for the specific purpose of overruling a line of decisions in which private parties who had suffered such particular injuries had been unable to obtain relief because of an existing inadequacy in substantive federal law. 21 Cong. Rec. 8605. This restriction on the availability of relief to persons actually injured by the challenged obstructions has been carefully preserved in the subsequent line of decisions in the lower courts affording relief to private parties under the Act. Tatum v. Blackstock, supra at 399; Carolina Power & Light Co. v. South Carolina Public Service Auth., supra at 524; Radford Iron Co. v. Appalachian Elec. Power Co., supra at 251-52; James River & Kanawha Canal Parks, Inc. v. Richmond Metropolitan Auth., supra at 638-39; Lavagnino v. Porto-Mix Concrete, Inc., supra at 325-26; Norfolk Dredging Co. v. Radcliff Materials, Inc., supra at 403; City of Memphis v. Ingram, supra at 398-99;

Carver v. San Pedro L.A. & S.L.R Co., supra at 335; Lownsdale v. Gray's Harbor Boom Co., supra at 987; E.A. Chatfield Co. v. City of New Haven, supra at 794. Accordingly, it is clear that a particular class of individuals has been singled out to receive the benefits granted by the Act, and that this first additional "factor" therefore favors effectuation of the congressional purpose to preserve the private remedy.

2. Consistency with the Legislative Purpose (Herein of the Alleged "Ill Effects" of Private Enforcement)

The next additional factor listed in Cort is whether the recognition of a private remedy would effectuate or frustrate "the underlying purpose of the legislative scheme." Cort v. Ash, supra at 78. Accord, Cannon v. University of Chicago, supra at 703. This question may seem somewhat anachronistic in this context because it seems to assume a typical modern situation in which the "underlying purpose" of the statute is the creation of some wider regulatory program to which private rights of action would be a mere adjunct, whereas this statute was enacted with a full awareness that the normal enforcement method against obstructions to navigation had been private injunctive actions and the enforcement authority of the Attorney General was itself envisioned as a mere adjunct to these private efforts which would be brought into play when it was necessary to confront some of the more resourceful and affluent violators with "a power that

they respect." 21 Cong. Rec. 8603. Nevertheless, since the federal government concededly now conducts an extensive enforcement program which neither respondents nor the Court would wish to see undermined, and since the government has claimed that private enforcement would have certain "ill effects" on that program, the issue of the compatibility of private remedies with the public regulatory scheme must be briefly addressed.

The short answer to the Solicitor General's argument is of course that the Corps of Engineers must simply be required to suffer any "ill effects" that might arise from private enforcement of section 10 because Congress clearly contemplated - indeed, desired - that such enforcement should take place. See Cannon, supra at 706-7 n.41. An almost equally obvious answer to the argument is that the Corps' enforcement program has apparently managed to survive and thrive despite the supposed "ill effects" of private actions during the preceding 80 years in which the lower federal courts have consistently and frequently entertained such actions. See cases cited at pages 48-53, supra. However, because of the substantial deference which the Court has accorded to the government's views on this type of issue in past cases (see Cannon, supra, at 687-88 n.8, 706-8; SIPC v. Barbour, supra at 414; Allen v. Board of Elections, supra at 557 n.23), respondents will eschew these easy answers and go on to demonstrate, first, that the government's fears are in fact entirely imaginary and, second, that consequences far more

undesirable than any conceivable "ill effects" of private enforcement will follow if the long-recognized private remedy for violations of the Rivers and Harbors Act should now be expunged by this Court.

The plaintiffs in this case have sought and obtained from the courts below a very limited form of relief, consisting of an injunction that would abate the challenged water diversions pending an application for a Corps permit and a determination by the Corps whether these diversions should be prevented or limited. Plaintiffs are not here seeking to have the courts dictate the outcome of that determination or even the manner in which the Corps should go about making it. They seek only to compel the initiation of the administrative process. Given the limited scope of this requested relief, it is difficult to conceive what "ill effects" might actually arise from permitting the action to be entertained.

In past cases, the typical difficulty which has led the Court to find that private relief would be undesirable has been potential inconsistencies between administrative determinations of the legality of regulated activities and privately initiated judicial determinations of that same issue. E.g., SIPC v. Barbour, supra at 422-23; National R.R. Pass. Corp. v. National Assn. of R.R. Passengers, supra at 463. As the Court expressly recognized in Allen v. Board of Elections, supra at 555 n.19, this type of problem simply does not arise where "the only question is whether [the challenged conduct]

must be submitted for approval." Accord, Potomac River Assn. v. Lundeberg Md. Sea School, Inc., supra at 356; James River & Kanawha Canal Parks, Inc. v. Richmond Metropolitan Auth., supra at 639. In cases presenting this limited issue, the only imaginable legitimate concern of the enforcement authorities would be the threat that private actions might force them to dissipate their resources in reviewing large numbers of trivial or obviously uncensurable activities. Any such threat can easily be forestalled, however, by the simple expedient of incorporating into the administrative process summary procedures for disposing of such unmeritorious complaints. Indeed, the Corps of Engineers itself appears to have already anticipated and resolved this very sort of problem by means of its "general permit" program. 33 C.F.R. §322.5(b). The "ill effects" of this limited type of private enforcement are thus seen to be either entirely illusory or easily manageable. The Solicitor General has offered nothing in his brief which would refute or qualify this conclusion.

Turning now to the potential adverse consequences of not permitting private enforcement of the Act, these are seen to be of two kinds, both of which are substantial. First, exclusive public enforcement would fail to achieve the congressional goal of vigorous protection of the nation's navigable waterways because, with respect to many of the activities most harmful to navigation, the public enforcement authorites are the proverbial "fox in the chicken coop." While the rail-

roads may have been the principal original target of the 1890 legislation, probably the most prominent potential violator of the Act today is, as this case illustrates, the federal Water and Power Resources Service.* Although this Court has long since held that the proscriptions and permit requirements of the Rivers and Harbors Act apply with their full vigor to the activities of this agency (United States v. Arizona, 295 U.S. 174, 184 (1935)), actual enforcement of its obligations in this regard obviously involves the Attorney General and the Corps of Engineers in a certain conflict of loyalties. In this type of circumstance, as the court below and other federal courts have previously recognized, private enforcement might well afford the only means of fully effectuating the congressional objectives underlying the enactment. Pet. App. 19; People of State of Illinois ex rel. Scott v. Hoffman, supra at 76; Miller v. Mallery, 410 F.Supp. 1283, 1289 (D.Ore. 1976); Natural Resources Defense Council v. Grant, supra at 290. The preclusion of such enforcement would accordingly risk substantial frus-

* As the court knows, one of the diversion facilities challenged by plaintiffs and found unlawful by the district court in this case was the Tracy Pumping Plant of the federal government's Central Valley Project (Pet. App. 88-90, 101-3). The court of appeals' dismissal of this claim, on the basis that Congress had implicitly exempted the plant from the Rivers and Harbors Act in the course of appropriating the funds for its construction (Pet. App. 40-49), is the subject of a separate review petition now pending in this Court. Sierra Club v. Andrus, No. 79-1625 (filed April 15, 1980).

tration of "the underlying purpose of the legislative scheme." Cort v. Ash, supra at 78. See Cannon v. University of Chicago, supra at 706-7.

A second adverse consequence of foreclosing private relief under the Rivers and Harbors Act would be to relegate protection of the country's navigable waterways to the vagaries of state nuisance laws. In those cases where, as here, the federal authorities have abdicated their responsibility to require administrative review of potentially obstructive activities, a nuisance action in a state court would be the only alternative relief available to an injured party in the event he were to be denied the right to compel such review by means of a private action under the Rivers and Harbors Act.* State nuisance laws being in a notorious state

* It is possible that a nuisance action could be prosecuted in a federal court under the federal common law of nuisance which the federal judiciary was authorized to develop by the decision of this Court in Illinois v. City of Milwaukee, 406 U.S. 91 (1972). However, there still appears to be some uncertainty whether that holding will ultimately be interpreted to authorize claims by private parties. See National Sea Clammers Assn. v. City of New York, supra at 1234; City of Evansville v. Kentucky Liquid Recycling, supra at 1018; Parsell v. Shell Oil Co., supra at 1280-81; Note, Federal Common Law and Interstate Pollution, 85 Harv. L.Rev. 1439 (1972). In any event, the "ill effects" on the government's administrative enforcement program, by way of potential inconsistent judicial determinations, of even federal nuisance actions would surely be greater than those that would arise from merely permitting private enforcement of the obligation to submit a challenged activity to Corps of Engineers review, which is the only relief sought here.

of confusion and conflict (see Prosser, Torts 571 (4th ed. 1971)), it would be hard to imagine an outcome more productive of "ill effects" upon the system of uniform federal regulation of navigation rights contemplated by Congress when it passed the Act. Only recently, in sustaining a private right of action in Transamerica Mortgage Advisers Assn. v. Lewis, supra, this Court stated that it would be an "anomalous construction" of a federal statute which, by denying a private federal remedy, would relegate enforcement of private rights in an important area of federal regulation to litigation in the state courts, let alone to litigation conducted, as it would be here, according to the vagaries and disparities of state substantive law. Id., 444 U.S. at 19.n8. This disturbing prospect thus provides, not only a final compelling reason why preclusion of private relief under the Rivers and Harbors Act would frustrate "the underlying purpose of the legislative scheme," but further reinforcement, if any were needed, of the earlier conclusion that such a result could not have been contemplated by Congress.

3. Relegation to State Law

The last of the Cort v. Ash "factors" is the question whether the subject matter of the action lies "in an area traditionally relegated to state law." Cort v. Ash, supra at 78. The intervening water agencies have argued in their brief that this question must be answered in the affirmative because plaintiffs are here seeking to prevent "the appropriation of waters within

California's borders . . . and . . . control of that activity has been traditionally relegated to the State" (Brief for Water Agencies, page 27).

This is a brazen mischaracterization of the nature of this action. Plaintiffs are not disgruntled water consumers seeking some different allocation of water appropriations but users of interstate navigable streams seeking to prevent the destruction of their capacity to support navigation; and the Rivers and Harbors Act of 1899 is not some regulation of competing appropriative water rights but the very cornerstone of the federal statutory framework for protection of the nation's system of navigable waterways from private and state interference and obstruction. See United States v. Republic Steel Corp., supra at 492-93. With the possible exceptions of national defense and foreign affairs, there is no area which, throughout the nation's history, has been more completely committed to federal control or of which the rubric "traditionally relegated to state law" would be less descriptive than that of regulation of interstate navigation. Kaiser Aetna v. United States, 444 U.S. 164, 173 (1979); Illinois v. City of Milwaukee, supra at 101; United States v. Appalachian Power Co., 311 U.S. 377, 426-27 (1940); Gilman v. Philadelphia, supra at 724-25; Gibbons v. Ogden, supra at 188-92.

E. Conclusion

Every relevant consideration thus supports the recognition of a private remedy for violations of

section 10 of the Rivers and Harbors Act of 1899. While the pertinent language of the Act is not explicit, it suggests the existence of a private remedy by granting unrestricted jurisdiction to the district courts of cases arising under the Act and by omitting any suggestion that public enforcement of the Act is intended to be exclusive. The common law background of the legislation reveals universal recognition of a private right to enjoin obstructions to navigation of the type prohibited by the Act, and the legislative history contains no indication that this established private right was intended to be abrogated by the authorization of supplementary public enforcement. The 80-year history of judicial interpretation of the statute reflects a consistent view that section 10 is privately enforceable, and the absence of congressional action to correct that view is further evidence that private enforcement accords with the intent of Congress. Finally, all of the other "factors" heretofore deemed "relevant" to implication of a private right of action, particularly the clear consistency of private enforcement with the "underlying purpose of the legislative scheme," militate in favor of such implication in this case. The court of appeals' holding on this issue should therefore be affirmed.

II. The State's Diversion of Water from the Delta Without a Corps of Engineers Permit Is a Clear Violation of Section 10 of the Act.

A. Introduction

The foregoing discussion of the first major question

presented by this case - whether there exists a private right to enforce the Rivers and Harbors Act of 1899 - has perforce been lengthy and thorough. This exhaustive treatment has been necessitated primarily by the fact that these respondents alone have been required to bear the burden of demonstrating an affirmative answer to this question, the federal respondents having taken an opposing position on the issue. In addition, respondents were unable to relieve themselves of this burden to any significant extent by reliance on the court of appeals' opinion, since certain intervening decisions of this Court had rendered many aspects of that opinion arguably obsolete with respect to its treatment of this issue. Respondents do not suffer from these same handicaps in dealing with the second of the two major issues presented here - namely, whether the challenged water diversions are in violation of the substantive prohibitions of section 10 of the Act. The court of appeals' opinion on this issue sets forth a painstaking and thoughtful analysis of the question to which little can or need be added. In addition, the federal respondents have sided with these respondents on this latter issue, and have previously submitted to the Court in their brief a thorough refutation, with which these respondents are in full accord, of each of the several arguments for rejecting the conclusions of the court of appeals that have been offered by the State and the intervening water agencies. Accordingly, these respondents will not burden the Court with yet another comprehensive

treatment of all of the numerous reasons and authorities which demonstrate the lack of merit in those arguments. Instead, they will rest content with a partial treatment in which they will emphasize only those few discrete points or authoritative sources which, for one reason or another, may not have received due emphasis in either the government's brief or the opinion of the court below.

B. The Legislative History, the Applicable Precedents and Every Consideration of Practicality Require Rejection of the Argument That a District Court Must First Find an Unreasonable Obstruction to Navigable Capacity Before the Corps of Engineers May Assume Jurisdiction to Examine That Same Issue, an Argument Which Is Futile in This Case in Any Event Because the District Court Did in Fact, Albeit Gratuitously, Make Precisely Such a Finding.

The first argument of the State and the intervenors is that section 10 of the Act must be construed to require a judicial finding of an unreasonable obstruction to navigation within the meaning of that section's first clause before any of the activities enumerated in the second and third clauses need be submitted to the Corps of Engineers for its determination of whether such an obstruction has occurred. The following two consecutive paragraphs from the brief of amici curiae States of Arizona et al. (at page 8) best epitomizes both the content and the fundamental flaw of these parties' argument on this question:

> From these cases, it should be clear that unless the structure or work would create some kind of obstruction to navigation or navigable capacity, the Army Corps of Engineers has no authority under Section 10 to require a permit.
>
> The Corps of Engineers has traditionally administered Section 10 consistently with this premise, so that the primary consideration in determining whether a permit should be issued has been whether the proposed structure or activity would adversely affect navigable capacity.

As stated in the second of these paragraphs, it is conceded by these parties that the issue which has been delegated for determination to the Corps of Engineers by the second and third clauses of section 10 is "whether the proposed structure or activity would adversely affect navigable capacity." As stated in the first quoted paragraph, however, they simultaneously argue that the Corps "has no authority under section 10" to commence proceedings to determine this question "unless the structure or work would create some kind of obstruction to navigation or navigable capacity." The question which determines the Corps' jurisdiction is thus precisely the same, under this interpretation, as the ultimate question which the Corps is called upon to decide when it reviews a permit application on the merits. That being so, the practical result of adopting this interpretation would be to require the Corps or, as here, some private party to secure a judicial determination that the challenged activity was in fact an obstruction to navigation before the perpetrators of

that activity could be forced to submit to a review and determination of that identical question by the Corps in an administrative proceeding.

The mere statement of this position is almost enough to refute it. Even aside from the perplexing problems of res judicata which might be presented by such a repetitive procedure, the sheer waste of administrative and judicial resources that it would entail is enough to impose on its advocates a heavy burden of clearly demonstrating that Congress has indeed mandated such a cumbersome and inefficient method of enforcing the Act.

The brief of the federal respondents has already adequately demonstrated that the State and the intervenors have utterly failed to carry this burden. As shown therein, there is nothing in the language of the section, its legislative history or any of its subsequent judicial applications that would support the impractical interpretation which these other parties have advocated. Quite to the contrary, as revealed in the government's brief (at pages 27-29), that interpretation has been repeatedly rejected by the decisions of this Court and the lower federal courts and, most tellingly, by the nearly contemporaneous commentary of the individual member of the War Department who was apparently the principal draftsman of the language in question. United States v. Republic Steel Corp., supra at 486-87; Wisconsin v. Illinois, supra at 412-13; Sanitary District of Chicago v. United States, 266 U.S. 405, 429

(1924); United States v. Joseph G. Moretti, Inc., 526 F.2d 1306, 1309 (5th Cir. 1976); Zabel v. Tabb, 430 F.2d 199, 207 (5th Cir. 1970); Tatum v. Blackstock, supra at 401; Hubbard v. Fort, 188 Fed. 987, 994-99 (D.N.J. 1911); Koonce, "Federal Laws Affecting Harbor Works," reprinted in Hearings on Water Pollution Control Legislation - 1971 (Oversight of Existing Programs) Before the House Comm. on Public Works, 92d Cong., 1st Sess. (1971), at page 289. Respondents have nothing to add to the government's discussion of these authorities.

This discussion should be augmented, however, by apprising the Court that the misguided interpretation of the statute now offered by these other parties was also expressly rejected by the Congress itself in the course of the legislative debates preceding the enactment of this section. At one point in those debates, an amendment was proposed by Senator Carlisle of Kentucky which would have required, as a prerequisite to prohibition and removal of an unauthorized structure, a judicial finding that it constituted an obstruction to navigation. 21 Cong. Rec. 8602. The following passages from the Congressional Record reflect some of the comments on this proposal offered by the bill's proponents and its ultimate rejection by the Senate (21 Cong. Rec. 8604, 8690):

> Mr. Gray. I can not imagine any greater source of confusion than this would prove to be if we lodged it in the circuit courts of the United States and nine or more of the circuit courts

all over the country were called upon to decide upon such evidences as they can bring before them whether certain structures are really an obstruction to navigation, called upon to decide a professional and scientific question lying outside of the domain of their education and knowlege entirely.

. . .

Mr. Pugh. Mr. President, will the Senator from Missouri allow me to make an inquiry in the line of his judgment in reference to this matter?

Mr. Vest. Certainly.

Mr. Pugh. Is not the question of obstruction of navigation more a question to be settled by the engineers than it is a judicial question to be settled by the courts?

Mr. Vest. It is, unequestionably.

Mr. Pugh. It seems to strike me that it is a question to be decided by the engineers, and not by a judicial adjudication.

Mr. Vest. That is unquestionable.

. . .

As I said before, we put these questions under the control of the War Department, which acts through the Bureau of Engineers.

As I said yesterday, all the feeling that I could possibly have in regard to this question, all the teachings of my life, are in behalf of the doctrine that every citizen, corporation, or private person should have their day in court; but we are driven by absolute exigencies to this sort of legislation. It is mockery to talk about a suit between these corporations and the Government of the United States, and in the meantime the citizen stands by and sees the navigation of a great river obstructed by a

bridge that ought never to have been put there. What is to become of the navigation of the country whilst this litigation is protracted from one tribunal to another, from one term of court to another? This is the only remedy; and I sincerely hope that the amendment of the Senator from Kentucky will be voted down.

The President pro tempore. The question is on agreeing to the amendment proposed by the Senator from Kentucky [Mr. Carlisle].

The amendment was rejected.

In the light of Congress's action in rejecting this proposed amendment and its stated reasons for that action, it is plain that adoption by this Court of the interpretation now urged by the State and the intervenors would constitute judicial enactment of precisely what the Congress deliberately decided not to enact.

The only additional observation which respondents would offer regarding this particular argument of the State and the intervenors is that they have chosen an especially inappropriate context in which to advance the argument. As it happens, the district court in this particular case fully acceded to their demand for a preliminary judicial determination of whether an obstruction to navigable capacity had been caused by the state's activities in the Delta and concluded that such an obstruction was amply demonstrated by the evidence (Pet. App. 87-92). Indeed, it expressly found that the diversion of water from navigable waterways that had taken place in this case was even greater than

the diversions found to have occurred in Sanitary District of Chicago v. United States, supra - the very case which these parties have held out to this Court as the paradigm of the type of judicial inquiry which their interpretation of the statute would mandate (Pet. App. 86-87 n.22). Respondents of course do not accept the view that the district court's examination of this question was required by the statute, and they agree instead with the federal respondents that the court of appeals' interpretation, which dispenses with the need for these sorts of findings as a prerequisite to the Corps' assumption of jurisdiction, is the correct one. It is nevertheless ironic that, even if this view were to be rejected in favor of an unqualified acceptance of the interpretation offered by the State and the intervenors, the presence of these unchallenged findings of the district court would still require that the judgment be affirmed on this record.

C. The Argument That the Statute Prohibits Only a Physical Disturbance of the Streambed Is Likewise Refuted by Both the Pertinent Authorities and Considerations of Practical Necessity.

The intervenors, though not the State, advance one further argument for which they purport to find support in the language of the statute. This is the contention that the reference to "the channel of any navigable water of the United States" in the third clause of section 10 confines the application of that clause, in the case of navigable rivers, to those activities which

physically disturb the streambed of the river, and precludes its application to any diversion of water from a river, however extensive it may be, which can be effected without causing such a physical disturbance.

Again, the brief of the federal respondents (at pages 29-39) adequately refutes the argument. As indicated therein, such a cramped construction of the statute would permit rampant evasion and frustration of its underlying purpose to protect the capacity of all of the nation's waterways to support navigation. As the government points out, this was precisely the concern which induced this Court to reject an identical restrictive interpretation of the 1890 predecessor statute in United States v. Rio Grande Dam & Irrig. Co., 174 U.S. 690, 708-9 (1899). See also United States v. Republic Steel Corp., supra at 485, 486 (third clause of section 10 covers any modification of "'the capacity of . . . the channel of any navigable water'" or of "'the course, location, condition, or capacity of' a navigable river"). Moreover, as the government's brief also shows, such an interpretation of the clause would effectively import into the statute a wholly different, and far less effective, scheme of regulation for rivers than for harbors, lakes and the several other kinds of waterbodies enumerated in that clause. These respondents would only add that such a result would be particularly irrational in light of the fact that rivers alone, among these enumerated water-bodies, flow from one place to another and hence are

exclusively susceptible to the very type of destruction of their navigable capacity by remote means which this proposed interpretation would authorize. See United States v. Rio Grande Dam & Irrig. Co., supra at 709.

D. The Argument That State Activities Are Exempt from the Statute Is Similary Contradicted by the Statutory Language, the Decisions of This Court and the Legislative History.

The final argument of the State and the intervenors abandons the relatively firm ground of statutory interpretation in favor of an open invitation to the Court to legislate, without any basis in the statutory language or any other form of congressional authorization, a complete exemption of state-authorized water diversions from the prohibitions of section 10. The Court should clearly understand that this is indeed the position these entities are taking. Though there is much talk in their briefs of a mere need to show some "deference" to state concerns and to "harmonize" state and federal interests in applying the federal navigation laws, they have in fact entirely refused to submit their activities to any procedure or process in which such "deference" might be afforded or such "harmonizing" might take place. They have instead, from the outset, relied exclusively on the self-help remedy of simply ignoring the federal navigation laws and the procedures established for their enforcement, and they now openly argue, at other points in their brief, that all of these laws and procedures simply "do not apply" to state-authorized water diversions (e.g., Brief for

California, page 48). They ask, in short, that this Court engraft upon the statute a complete and unqualified exemption for all such state activities.

The numerous faults of the arguments which these parties have conjured in support of this revolutionary proposal are sufficiently catalogued in the government's brief. As is shown there, if stare decisis means anything at all, it requires rejection of the contention that state-sponsored activities enjoy some form of special exemption from the navigation laws, this very contention having been repudiated, either expressly or by implication, in numerous prior decisions of this Court, as well as of the lower federal courts. E.g., United States v. Arizona, supra at 184; New Jersey v. New York, 283 U.S. 336, 344-45, 348 (1931); Wisconsin v. Illinois, supra at 401, 417;* Sanitary District of Chicago v. United States, supra at 426-26, 431-32; United States v. Rio Grande Dam & Irrig. Co., supra at 709; Riggle v. State of California, supra at 982-83; Williamson Towing Co. v. State of Illinois, 534 F.2d 758, 761 (7th Cir. 1976); Monroe County Cons. Council v. Volpe, supra; Zabel v. Tabb, supra at 201-2; Red Star Towing & Transp. Co. v. Department of Transportation,

* In this case, the Court held that the Corps of Engineers was not only not required to exempt a state sewage disposal project from the prohibitions of the Act but was not even permitted to afford any special consideration to the state's sanitation needs where these conflicted with the federal interest in protection of navigation. Id., 278 U.S. at 418.

supra; Neches Canal Co. v. Miller & Vidor Lumber Co., supra at 764-65; James River & Kanawha Canal Parks, Inc. v. Richmond Metropolitan Auth., supra; Citizens Comm. for the Hudson Valley v. Volpe, supra; Lauritzen v. Chesapeake Bay Bridge & Tunnel Dist., supra at 637-38. The government's brief also persuasively disposes of the suggestion that the various reclamation statutes enacted by Congress can be read as implicitly precluding application of the navigation laws to state water projects, including the particular assertion that support for this notion can somehow be derived from this Court's recent expansive construction of these statutes in California v. United States, 438 U.S. 645 (1978). In fact, the Court went considerably out of its way in that case to avoid lending any encouragement to such an interpretation of its decision by using the term "non-navigable" or its equivalent no less than ten times in the course of its opinion. Id., 438 U.S. at 655 n.9, 657, 657 n.11, 658, 661 n.16, 662, 670.

It is an accurate ultimate measure of the utter lack of authoritative support which exists for any different treatment of state projects under the navigation laws that one of the few sources which the State is able to cite for this novel conceit is a 1912 treatise composed by an advocate of local control over western water rights who, in fact, flatly rejects this interpretation of the law and every element of the arguments which the State and the intervenors have mustered in support of it. 1 Kinney, Irrigation and Water Rights

578, 588-97, 1155 (2d ed. 1912). Although the federal respondents have previously pointed out the State's misuse of this source, it is worth quoting this author's actual views at some length, as they administer a fitting coup de grace to this entire unfounded theory (Id., at 590, 591, 594-97):

> There are other methods of destroying the navigable capacity of a body of water than by the construction of bridges, or dams, at navigable points, which we have discussed in previous sections. Dams may be constructed higher up on the stream than the point of navigability, which hold the water back that would otherwise naturally flow down and add to the flow in the navigable portion. . . . The waters from the tributaries of the stream may be diverted from their natural course to such an extent that the capacity for the navigation of the main river may be partially or wholly destroyed. All of these must in time give way to the paramount right of navigation, unless Congress makes some radical changes in the law as it now stands, based upon the theory of the relative importance of interests.
>
> . . .
>
> Congress has seen fit to place the navigation of all the public waters of the United States paramount to all other uses of water. It is true that . . ., by the Act of July 26, 1866, Congress recognized, so far as the United States is concerned, the validity of the local customs, laws and decisions of the courts in respect to the appropriation of water, . . . [and further stated in subsequent enactments] that the provisions therein granted should not be construed to interfere with the control of waters for irrigation and other purposes under the authority of the respective States or Territories. . . [But] in none of these Acts is there any express right given to appro-

priate the waters of any navigable body of water of the United States, or in any way interfere with the navigable capacity of any of these waters. In one of these acts the navigable waters were expressly reserved, notably the Act of 1877, from these appropriations. And, as was said by the Supreme Court of the United States, in the case of the United States v. Rio Grande Dam & Irrigation Co., "to infer therefrom that Congress intended to release its control over the navigable streams of the country and to grant in aid of mining industries and the reclamation of arid lands the right to appropriate the waters on the sources of navigable streams to such an extent as to destroy the navigability, is to carry those statutes beyond what their fair import permits."

Upon the other hand, Congress has passed Acts directly forbidding the interference with the navigable capacity of any of the navigable waters of the United States. By the Act of September 19, 1890, as amended by the Act of March 3, 1899, it is expressly provided, that the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States was thereby prohibited; and the section further provides that it shall not be lawful to alter or modify the course, location, condition, or capacity of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to the beginning of the same. Section 12 of the Act provides for severe penalties against any person or corporation violating any of the provisions of Section 10.

. . .

It is evident that Congress, perceiving that the old rule that a State could authorize any obstructions to the navigability of a stream or body of water of the United States

until interfered with by Congress, was gradually leading to the destruction of the inland waterways of the country as far as the purposes of navigation were concerned, and that the time had come that the navigable waters of the United States should be subjected to the direct control of the National Government, and that nothing should be done by any State tending to destroy the navigability of any of these waters without the explicit consent of the Government.

. . .

Under the statutes of the United States as they are now in force, and as the same are construed by the courts, the irrigation interests, as developed under the laws of the separate States, are not only threatened with serious impairment of their progress in the future, but also interests already in existence are threatened. It must be conceded, as was held by the Supreme Court of the United States, in United States v. Rio Grande Dam & Irrigation Co., that the jurisdiction of the general Government over interstate commerce and its natural highways vests in Congress the right to take all needed measures to preserve the navigability of the navigable water courses of the United States, even against any State action.

As Mr. Kinney observes, no matter how undesirable it may seem from the point of view of the western states that state water diversion projects enjoy no exemption or entitlement to special treatment under the federal navigation laws, this misfortune must simply be tolerated "unless Congress makes some radical changes in the law as it now stands." Id. at 591. The State and the intervenors have asked this Court, by judicial fiat, to make the "radical changes" which Congress has declined to make. Their request is plainly addressed to the wrong forum.

The only further item which respondents would add to the government's refutation of the other parties' argument on this issue is a demonstration that their position is also directly contradicted by the legislative history of the 1899 Act itself. As noted earlier, the principal purpose of this statute, when it was originally enacted in the form of its 1890 predecessor, was to overrule a line of Supreme Court decisions holding that, under existing law, bridges and other projects obstructing navigable rivers could not be prevented either by the federal government or by private parties where these activities had been specifically authorized by state laws or state franchises. Willamette Iron Bridge Co. v. Hatch, supra; Huse v. Glover, supra; Hamilton v. Vicksburg, Shreveport & Pacific R.R. Co., supra; Cardwell v. American River Bridge Co., supra; Escanaba & Lake Mich. Transp. Co. v. City of Chicago, supra; Pound v. Turck, supra; Gilman v. Philadelphia, supra. The intent of Congress to assert the paramount federal authority over navigation and thus to override all forms of state authorized interference with use of the nation's navigable waterways was clearly expressed during the debate on the Act on the floor of the Senate (21 Cong. Rec. 8605):

> Mr. Dolph. I had the honor to represent one of the parties in Hatch & Lonsdale vs. the Willamette Bridge Company, referred to by the Senator from Vermont. The Supreme Court had anticipated the decision in that case and in other cases, notably in The City of Chicago vs. The Escanaba Company, decided some years

previous to the one referred to by the Senator from Vermont, and the Supreme Court has also expressly held that until Congress does assert its power of jurisdiction over navigable streams wholly within the limits of a State, the legislative authority of the States may authorize the construction of bridges across such streams.

Mr. Edmunds. They have gone further than that even, that if it goes outside the State line —

Mr. Dolph. I mean to say at a point where the river is entirely within the boundaries of a State; but it is competent at any time for Congress to assert its authority, and the moment the United States occupies the field and Congress exercises its authority, that moment the power of the State ceases.

Mr. Edmunds. Yes; but my friend from Oregon will agree with me that the court has said - and I think probably rightly in point of law - that the assertion of this power must be made by Congress, and that until it does make it the obstruction of a stream is no violation of any law of Congress and not of the common law, because the United States has no common law; and, therefore, if there is anything to stop it, it is only state law.

Mr. Dolph. That is correct.

Mr. Gray. It was for that purpose that the amendment which I understood was introduced by the Senator from Vermont the other day was offered.*

Mr. Edmunds. Exactly. It was reported from our committee after consideration of the subject.

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* This was the amendment that ultimately became Section 12 of the present Act. See 21 Cong. Rec. 8603, 8607-8.

Mr. Dolph. It is held by the Supreme Court that an act of the State Legislature authorizingthe construction of a bridge, or any other obstruction to a navigable river or navigable water, entirely within the limits of a State, is a sufficient justification of the act.

. . .

But Congress may at any time exert its authority. It does not do that by simply making appropriations for the improvement of a river or authorizing the construction of one bridge over a stream. It would require the express authority of Congress for the assumption of this power and the exercise of the jurisdiction.

Mr. Gray. Gilman vs. Philadelphia is a leading case on that point.

Mr. Dolph. I desire to say that the Senate at the Fiftieth Congress and also at the present session of Congress passed an act [the original Dolph Bill] covering this whole question of the obstruction of navigable waters.

Mr. Gray. Has passed an act?

Mr Dolph. The Senate passed a bill which has been reported favorably in the House and is now on the Calendar there. One section of that bill provides that hereafter whenever a State authorizes a bridge over a navigable stream the plan shall be submitted to the Secretary of War and approved by him before the bridge shall be built. Another section provides that there shall be no piers or bulkheads constructed in a river or other navigable water without the approval of the Secretary of War, and prevents the casting or throwing of sawdust and other material into a navigable river, which would naturally impede navigation.

Mr. Edmunds. Are you speaking of the law?

Mr. Dolph. No; I am speaking of the bill which has passed the Senate at two different sessions,

in answer to what was said by the Senator from Delaware. That bill, as I say, has been reported favorably in the other House and is on its Calendar. It covers the subject of wrecks and of other obstructions to navigable streams, and if passed would be a partial exertion of the power of Congress to regulate the construction of bridges over navigable streams within the States.

The purpose of the original statute to override the states' authority to permit obstructions to navigation, which is so clearly expressed in this colloquy, was nevertheless frustrated when this Court, apparently without examining the legislative history, interpreted the statutory exemption for projects "affirmatively authorized by law" in Section 10 of the 1890 Act as encompassing authorizations by state law as well as federal law. United States v. Bellingham Boom Co., 176 U.S. 211, 215 (1899). One of the few substantive changes which Congress was forced to make in the 1899 recodification was, therefore, to substitute for the quoted words the new language "affirmatively authorized by Congress." 33 U.S.C. §403. This Court has previously acknowledged that the entire purpose of this change was to eliminate once and for all the exemption for state-authorized projects that had been judicially created by the decision in Bellingham Bay Boom Co., supra. Wisconsin v. Illinois, supra at 412; Sanitary District of Chicago v. United States, supra at 428-29. See also United States v. Republic Steel Corp., supra at 504 n.25 (Harlan, J., dissenting); Hubbard v. Fort, supra at 997-98.

Thus, both in the legislative history of the original enactment and by this later corrective amendment, Congress has provided the clearest possible statement of its intention that no implied exemption for state-authorized activities should be read into the Rivers and Harbors Act. In now urging the adoption of just such an exemption, therefore, the State and the intervenors are proposing nothing less than direct contravention of the congressional will.

E. The Contention That the Permit for the Clifton Court Forebay Intake Facility Authorized the Earlier Construction of the Entire Delta Pumping Plant Is Refuted by the Record.

Respondents have little to add to the lower courts' disposition of the rather audacious, if not disingenuous, contention that the entire Delta Pumping Plant was implicitly authorized by the Corps of Engineers' issuance of a permit for a later addition to the plant known as the Clifton Court Forebay Intake (Pet. App. 50-52, 97-99). Even if it were to be assumed that the district court's rejection of this contention is not a finding of fact that is entitled to affirmance unless found to be "clearly erroneous," no basis whatsoever could be found in the record for questioning that court's conclusion that this permit, which fails even to refer to the pumping plant, constituted an official authorization of that facility (Pet. App. 50, 98; Jt. App. 115a-119a). The most that might be permitted by the record is speculation that some private understanding

of the Corps' acquiescence in the existing pumping plant might have accompanied the later issuance of the intake permit. But no legal significance could be attributed to such an understanding in any event in the absence of the required public hearing or of any notice to the public that this permit was intended to authorize more than it appeared to authorize. See 33 C.F.R. §§325.2(a), 325.3, 327.

F. Conclusion

Thus, it has been demonstrated that under any possible sensible construction of the language of the Rivers and Harbors Act the water diversions found to have been carried out by the State of California in this case must be found to be unlawful in the absence of a valid and express permit from the Corps of Engineers. Both of the proposed alternative interpretations of the language of the section relied upon by the State and the intervenors to avoid this result are without any authoritative support and would in any event engender unacceptable practical consequences. As for the further argument that the Court should simply exempt all state water diversions from the terms of the statute, acceptance of this argument would directly contravene the clearest possible congressional expression that no such exemption is to be allowed. Finally, the argument that aall of the State's activities were actually authorized by the Corps of Engineers when it granted a permit for an ancillary addition to the State's facilities is so lacking in support as to border on the frivolous.

CONCLUSION

The court of appeals was correct in its determination (1) that a private right of action exists to enforce the provisions of section 10 of the Rivers and Harbors Act of 1899, and (2) that the statute prohibits the unauthorized water diversions shown to have been carried out by the State of California in this case. The court of appeals' judgment on these issues must accordingly be affirmed.

Dated: December 30, 1980

Respectfully submitted,

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Nos. 79-1252 and 79-1502

SUPREME COURT OF THE UNITED STATES

October Term, 1980

STATE OF CALIFORNIA, et al.,
Petitioners,

v.

SIERRA CLUB, et al.,
Respondents.

KERN COUNTY WATER AGENCY, et al.,
Petitioners,

v.

SIERRA CLUB, et al.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

AFFIDAVIT OF SERVICE

STATE OF CALIFORNIA)
)ss.
COUNTY OF SAN FRANCISCO)

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Subscribed and sworn to before me on this 31 day of December, 1980.

Notary Public